Supreme Court, U.S.
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No. 06-

In The Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the determination of whether a prosecutor has exercised peremptory challenges in a racially discriminatory manner is a three step process. First, the petitioner must make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race. Second, the prosecutor must provide facially race neutral explanations for the strikes. The third step involves evaluating the persuasiveness of the prosecutor's justifications. *Rice v. Collins*, 126 S.Ct 969 (2006). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)("*Miller-El II*").

The lower court majority affirmed the denial of Petitioner's *Batson* claim prior to this Court's decision in *Miller-El II*. Thereafter, this Court granted Petitioner's certiorari petition, vacated the lower court's majority decision, and remanded "for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005)." *Hightower v. Schofield*, 545 U.S. 1124 (2005). On remand, the lower court majority held that *Miller-El II* "does not control our decision" and reinstated its prior opinion. *Hightower v. Terry*, 459 F.3d 1067, 1069 (11th Cir. 2006). Judge Wilson, dissenting, found that the prosecutor had discriminated on the basis of race, and so he would have ordered a new trial. He also found that "[r]einstating the prior panel opinion violates the Supreme Court's express mandate." *Hightower v. Terry*, 459 F.3d 1067, 1078 (11th Cir. 2006)(dissenting).

Under these circumstances, this case presents the following questions:

I. Whether the majority of the Eleventh Circuit violated this Court's remand order that Hightower's claims receive further consideration in light of *Miller-El II* when it held that *Miller-El II* did not control and that a comparison of the characteristics and responses of seated white jurors with those of struck black jurors was irrelevant to the determination of whether the state court's decision was an unreasonable application of federal law because an explicit comparative juror analysis was not presented in the briefs to the state supreme court but was contained in the voir dire record?

II. Whether the Eleventh Circuit majority violated this Court's remand order when it refused to consider the prosecutor's documented history of discrimination in jury selection in other cases, despite defense counsel's express reliance on that history in support of his *Batson* motion, the trial court's apparent knowledge of the underlying facts about the prosecutor's history, and the prosecutor's failure to deny the underlying facts?

III. Whether the Eleventh Circuit majority acted contrary to *Miller-El II* and *Batson* in finding that the Georgia Supreme Court's decision was neither contrary to nor an unreasonable application of clearly established federal law despite the fact that neither the trial court nor the Georgia Supreme Court ever determined whether any or all of the prosecutor's proffered reasons for striking six black jurors were credible, but only determined that the proffered reasons were facially race-neutral?

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PETITION FOR WRIT OF CERTIORARI

Mr. Hightower respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION AND LOWER COURT OPINION

The majority and dissenting opinions from the lower court are published at 459 F.3d 1067 (11th Cir. 2006), and reprinted at A1-22. The opinion issued August 8, 2006. Rehearing was denied on September 11, 2006. *See* A23. Petitioner received an extension of time to file this Petition until February 8, 2007. This Court has 28 U.S.C. § 1254 jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was convicted of three counts of murder on May 4, 1988, by a jury in the Superior Court of Putnam County, Georgia. The victims were Petitioner's wife and two children. The same day, the jury sentenced him to death. The Georgia Supreme Court affirmed. *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989). This Court denied a Petition for Writ of Certiorari. *Hightower v. Georgia*, 498 U.S. 882 (1990). Petitioner filed a Petition for Writ of Habeas Corpus with the Superior Court of Butts County which was denied. *Hightower v. Zant*, 91-CV-3713. Petitioner then filed an Application for Certificate of Probable Cause to Appeal with the Georgia Supreme Court, which was denied. *Hightower v. Zant*, No.

S94H0761. A Petition for Writ of Certiorari to this Court was denied. *Hightower v. Thomas*, 515 U.S. 1162 (1995).

On November 26, 1996, Petitioner filed a petition pursuant to 28 U.S.C. § 2254 with the United States District Court for the Middle District of Georgia which was denied. *Hightower v. Turpin*, 96-00097-3:CV. *See* A25-79. The Eleventh Circuit affirmed, with a concurring opinion by Judge Wilson. *Hightower v. Schofield*, 365 F.3d 1008 (11th Cir. 2004)(*Hightower I*). A90-162. Petitioner filed a Petition for Writ of Certiorari which this Court granted, vacating the lower court's decision and remandng "for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005)." *Hightower v. Schofield*, 545 U.S. 1124 (2005). A majority below held "*Miller-El* does not control our decision" and "our opinion in *Hightower v. Schofield* is accordingly reinstated." *Hightower II*, 459 F.3d at 1072. Judge Wilson dissented and would have granted the Petition.

B. Facts Relevant to Questions Presented

1. The Trial Court Evidence and Ruling.

a. The prosecutor's prior history of discrimination presented to the trial court

Mr. Hightower, an African-American, was charged in Putnam County, Georgia, with the murder of his wife and two step-children. During jury selection, the prosecutor, Joseph Briley, used six of seven peremptory challenges to strike African-Americans from the venire. Defense counsel objected after each strike. Once the jurors were chosen, but before they were sworn in, the trial court judge held a hearing on defense counsel's claim that the prosecutor's actions had violated *Batson*. This hearing began with defense counsel stating:

> Out of that seven he has used six of those strikes to strike blacks, black males or black women. The *Batson v. Kentucky* test that the defendant must show

any relevant circumstances that raise an inference that the prosecutor excluded jurors on account of their race. We show that he used these pre-emptories (sic) to remove members of the defendant's race. The defendant is a member of a cognizable race or group which are blacks. *We would also state that Mr. Briley has in the past shown a bent and scheme to keep down the low number of blacks* on either the grand jury or regular panels. We would state that *this was the bent of mind and the type of thing that Mr. Briley is doing at this time. He has purposely excluded blacks so that Mr. Hightower will not get a fair and impartial hearing on this case and this matter.*

Your Honor, I have here a copy of the Fulton Daily Reporter which was on Wednesday, March 30, 1998, where we got headlines, Does County Plan to Discriminate, high court hears jury panel. This was regarding the case of the *State vs. Amadeo* which has gone up to the [ ] Supreme Court. I will make a quote here from the U.S. Supreme Court I will make a quote here from the U.S. Supreme Court Justice John Paul Stevens. "The evidence disclosed is the intentional program of rigging the jury by the prosecutor's office."[1] This arose out of a memo which has been

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[1]Mr. Briley had authored a memorandum to Putnam County commissioners explaining how to underrepresent blacks, women, and young people on grand and petit juries. Mr. Amadeo, a Putnam County death-sentenced inmate, filed a petition for writ of habeas corpus challenging his conviction based upon this intentional discrimination. The federal district court granted the writ for Mr. Amadeo, finding that Mr. Briley's conduct constituted "intentional racial discrimination." *Amadeo v. Zant*, 486 U.S. 214, 228 (1988). The state did not dispute that Briley had intended to discriminate on the basis of race. The district court also found that Mr. Amadeo's "default" of the claim in state court was excused by "cause," *i.e.*, because the state had concealed its own misconduct. The United States

> attributed to Mr. Briley stating that there was a purpose and a plan to have a member (sic) number of blacks on the grand jury in Putnam County in order to have it just half the jury criteria for grand jury. We would state, and this was in 19–Your Honor may know. *You are well acquainted with that case, Your Honor. We would say that this is the same circumstances, the same sort of scheme that Mr. Briley was doing in this particular case.* He is purposely using his strikes to provide for just the minimum amount of blacks, absolutely the minimum amount, but what he has done is prevented Mr. Hightower from getting a fair and impartial hearing.

R. 616-617 (emphasis added)(A164-165). Briley stated:

> Insofar as the statements from the Daily Report and the statements from Justice Stevens, I would like to say that I don't know if it is in there or not, but I believe Justice O'Connor asked the defense lawyer in this case, Amadeo's lawyer looked and said "couldn't it have been that Mr. Briley was trying to get the matter improved and was telling them how few they could put on it, in the jury box." So, Your Honor, it is a matter of which direction you look in this case and **Your Honor is perfectly familiar with that case.** And insofar as *Amadeo* is concerned, it didn't arise

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Court of Appeals for the Eleventh Circuit reversed the district court and held that trial counsel could have discovered the misconduct earlier. This Court reversed, reinstating the district court's grant of relief, because the record sufficiently supported the district court's "cause" findings. In the above comments, counsel quoted from a March 30, 1988, newspaper article about the *Amadeo* argument before this Court. *See also* Gohm, R., "Capital Punishment in Two Judicial Circuits in Georgia," 18 Law and Human Behavior 319, 328 (1994)("Justice Stevens called it '"an intentional program of rigging the jury by the prosecutor's office.'").

> out of that. That evidence was in a civil case, a voting rights case, in Putnam County and of course, Amadeo's defense was perfectly aware of that and chose not to raise the question.[2] And if the question had been raised, a new jury would have been drawn.

R. 618 (emphasis added)(A166). After the judge heard Briley's stated reasons for his strikes, defense counsel offered the newspaper article into evidence. Briley objected that "[i]t hasn't been established that it is an actual true copy" of the article, R. 626, A172, but did not deny the underlying facts. The court sustained the objection to the article's admission. *Id.*

b. Prosecutor Briley's selection of jurors

i. Black juror strikes purportedly based upon family members' crimes.

Briley purported to explain the strikes of three black jurors as motivated by concern over the crimes their family members had committed. Briley said that he struck Thelma Butler, a black woman, because he had prosecuted her brother-in-law, Gerald Veasley, twelve years earlier, and because Ms. Butler exhibited some hostility. However, the prosecutor asked Butler no questions regarding the nature of her relationship with her brother-in-law, or even whether she had a relationship with him, and failed to inquire whether her brother-in-law's crime a dozen years earlier would affect Butler's ability responsibly to serve. R. 623, A169-170. Moreover, nothing in the record suggested that she was "hostile" to the prosecution; rather, she was concerned that murderers were often treated too leniently.

Briley stated that he struck another black juror, Ricky Thomas, because Thomas's father had been convicted of killing Thomas's mother and because Thomas had lived with his father after his father's release from prison. Briley speculated, without

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[2]This Court later unanimously upheld the district court's finding that defense counsel had not known. *Amadeo*, 486 U.S. at 224.

record support, that Thomas might "possibly identify his father's case with this one." R. 619, A187. Thomas testified, however, that he did not even remember the circumstances of his father's case because he was only a child at the time, and Briley failed to question Thomas about either his relationship with his father or what , if any, way this tragedy would affect his ability to apply the law. R. 70-71.

Briley's purported reason for striking Mattie Pearl Harris was most surprising. Briley "explained" that he struck her because her son had been locked up frequently and she did not want him punished, and because her daughter had been convicted and imprisoned and Harris was caring for her children. R. 621 The record unambiguously contradicts these assertions; Ms. Harris said nothing about her son being in/out of jail, or that she did not want him punished, and nothing about her daughter being in jail. R. 182-83; 195; 205; 214; 221.

ii. White juror convicted of homicide served on jury

Briley's strike of three black jurors based on familial relationships with criminals - all of which were unexplored, one of which was distant, and one of which was a figment of Briley's imagination – stands in stark contrast to his treatment of Michael Hensler, a white male. Hensler ***had himself been prosecuted and convicted of voluntary manslaughter by Briley's office*** (R. 70) but Briley did not challenge him. Hensler was seated and Briley said nothing to explain the disparate treatment of black and white jurors.

iii. Black juror strikes purportedly based on their death penalty attitudes.

Briley explained the strikes of two black jurors and one black alternate juror as founded solely on their attitudes about the death penalty, and augmented his explanation of his decision to strike Mattie Pearl Harris as related to her death penalty attitudes as well as her family relationships. He said he

struck Emerson Davis because he was "somewhat opposed to the death penalty. As compared to other people we had on that question about the death penalty, he was undesirable from that point of view." R. 624, A170. In fact, during voir dire Davis stated: (1) that he did not oppose the death penalty (R. 344) and never wavered from that position; (2) that he would reserve judgment on sentence until the end of the penalty phase (R. 350); (3) that he believed people charged with murder were treated fairly (R. 386); and (4) that he could impose a death sentence after hearing all the evidence R. 388.

Briley stated that he struck Norman Mack because he contradicted himself on the death penalty issue - first stating that he conscientiously opposed it, then somewhat in favor, then opposed under some circumstances. R. 623, A168-169. This statement was inaccurate. Mack actually testified that: he would not decide punishment until after hearing all the evidence (R. 244); that if a defendant was convicted of three murders, he would still wait until after presentation of penalty phase evidence to make up his mind (as all other accepted jurors said) (R. 249); that he was not opposed to the death penalty, but that it depended on the circumstances; (R. 254); and that he was somewhat in favor of the death penalty. R. 312.

In addition to his false assertions about Mattie Pearl Harris's children and their imagined criminal records, Briley said he struck Mattie Pearl Harris in part because she expressed uncertainty about the death penalty and because she said that someone who killed three people was sick and needed help. R. 621, A168. However, Harris's reference to mental illness came in response to defense counsel's question as to whether she would "automatically" give the death penalty for the killer of three persons, to which she quite reasonably came up with a situation in which she would not "automatically" do so.

Briley stated that he struck prospective alternate juror Lynnette Davis, a black woman, because she indicated that she

was against the death penalty, but could impose it in certain circumstances. R. 625, A171. Her testimony was actually more ambiguous. She said she was unopposed to the death penalty (R. 432); would keep an open mind until after introduction of evidence during the penalty phase (R. 437, 488); was against the death penalty, but could impose it after hearing the evidence, and could keep an open mind. R. 491.

iv. White jurors not struck for same death penalty attitudes.

Thus, Briley claimed to have struck one black juror based on his supposed opposition to the death penalty despite the fact that he never expressed opposition to the death penalty; struck one black juror for purported contradictions in his death penalty attitudes, despite the fact that he did not contradict himself; and struck two more black jurors for what turned out to be weak statements of preference against the death penalty or willingness to choose life. These "reasons" stand in sharp contrast to the prosecutor's treatment of white jurors who were less than adamant about the desirability of the death penalty. Most notably, Michael Hensler, the white man who served despite having been previously convicted of manslaughter testified that he believed in the death penalty in some cases, but that in certain cases, life is the fair sentence. R. 103-04.[3]

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[3]Thomas Harris, also white, testified that he could vote for the death penalty in more serious cases, but that in some cases life was an appropriate sentence. R. 103. Katherine Gillespie, a white woman, testified that she believed the death penalty is appropriate in some cases, but that there are also times when life is appropriate. R. 108. Merrick Carter, a white man, testified that he would have to hear the entire case before deciding which way to vote on punishment. R. 215 Carter also stated that even with three killings, although he was strongly in favor of the death penalty, he would want to first hear all the evidence. R. 213. Deborah West, a white woman, would have to wait until after she heard all penalty phase testimony before deciding punishment. R. 218. Richard Lester, a white man, testified that if the defendant was convicted of three killings, he could not automatically impose the death penalty because three killings does not tell you enough. R.

c. Judge: Stated reasons "non race related"

When Briley finished each juror, the trial court judge stated seriatim "the state has stated an articulable reason for striking juror [fill in the blank: Ricky Thomas, Mattie Pearl Harris, Norman Mack, Thelma Butler, and Emerson Davis, Jr.], and the reason is not race related." R. 619 - 626, A168-171. He said nothing further until Briley completed all strikes, then stated that "after hearing the defendant's motions under *Batson* I find that the defendant has failed to establish a prima facie case of discrimination on the part of the district attorney. I further find that as to each individual strike, the state has presented an articulable non race related reason for striking the prospective juror." R. 626, A172. At no point did the judge say anything about the credibility of Briley's explanations.

2. The Terse Affirmance

On appeal to the Georgia Supreme Court, the state defended the trial court's denial of the *Batson* motion solely on the basis that "the state adequately met its burden of proof with a neutral and specific reason for each strike." State's Brief at

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217. William Nunn, a white man, testified that he would not automatically impose the death penalty just because there were three people killed. He indicated that it really did not matter whether it was one person or ten people killed, the imposition of the death penalty would just depend on the circumstances. R. 221. Gary Prichett, a white man, indicated that even if the defendant was convicted of killing three people he would want to know the circumstances before deciding on a punishment. R. 219. Prichett was strongly in favor of the death penalty, but "every case doesn't deserve capital punishment there's going to be some that deserve life." R. 214. James Chilton, a white man, testified that he would consider imposing life in prison as a penalty, but did not want a person who killed three people on the street. R. 229. Miriam Shatterly, a white woman, testified that she is "somewhat" in favor of the death penalty. R. 305. Rufus Little, a white man, testified that he believes people charged with murder are treated too harshly. R. 385. Little indicated that he would have to hear the entire case before deciding on a penalty. R. 391. John Hutcheson, a white man, testified that he would vote for life depending on the circumstances. R. 389.

47. The state's brief did not argue that Briley's stated reasons were true, or even that Briley did not intentionally discriminate against the black jurors, but only that his explanations were facially "neutral and specific." The state urged the court to affirm the trial court unless the trial court findings were clearly erroneous. *Id.* at 48. The Georgia Supreme Court did:

> [The prosecutor] used six of those seven strikes against black prospective jurors. The record shows that at least two black prospective jurors were struck by the defendant after having been accepted by the prosecutor. The prosecutor explained his peremptory challenges. Four of the challenged prospective jurors were closely related to persons convicted of serious felonies. The other two were conscientiously opposed to the death penalty, although not to the extent they were excused for cause. *The trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie case, the trial court's determination is not clearly erroneous.*

Hightower, 386 S.E.2d at 512 (citations omitted)(emphasis added). This opinion, like the trial court ruling, made no mention of the credibility of the prosecutor's facially race-neutral reasons, and did not suggest that anything more than the assertion of a facially neutral reason was required.

3. State Habeas Corpus–Res Judicata

Petitioner again raised his *Batson* claim in state habeas corpus proceedings and the state habeas judge ruled that the decision on direct appeal was res judicata. Petitioner raised the issue before the Georgia Supreme Court in a certificate for probable cause to appeal, which was denied.

4. Federal District Court: Denial on the Merits.

In his petition for writ of habeas corpus, Petitioner pled his *Batson* claim, which included comparisons between the struck

black jurors and the seated white jurors. A175-187. The state filed an answer and motion to dismiss, as well as a brief in support of its motion. In these documents the state advised the court that the Fourteenth Amendment challenge was not defaulted. A190. The federal district court denied the petition, including the *Batson* claim. The court did not find or even discuss any possible "default" of the *Batson* claim. Because it also failed to address comparisons between struck black jurors and seated white jurors, Petitioner filed a motion to alter or amend the judgment under Fed. R. Civ. 59. In that motion, Petitioner argued that the district court had failed to conduct a comparative juror analysis and that such an analysis was required. A194-205.

The district court judge entered an order denying the motion to alter or amend. Regarding *Batson,* the district court did not write that it had refused to (or could not) consider comparative juror analysis. Rather, the court wrote that comparative juror analysis "amount[s] to a disagreement with the conclusion of this court as to whether the third prong of *Batson* was satisfied."A208.[4]

5. *Hightower I*: The Majority Addresses Briley's History of Racial Discrimination and Comparative Juror Analysis on the Merits, but Rejects Petitioner's Claim, While Judge Wilson Concurs, with Reservations.

The majority began by noting that "[t[he Georgia Supreme Court rejected each of the *Batson* claims on direct appeal. *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989). Thus, our review is again limited by 28 U.S.C. § 2254(d)." *Hightower I*, 365 F.3d at .1029. The majority acknowledged

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[4]After this Court remanded, the lower court majority wrote, for the first time, that the district court had refused to consider comparative juror analysis because it was "defaulted." *Hightower II*, 459 F.3d at 1071, n. 7. In fact, the district court did not even allude to default.

Briley's history of racial discrimination,[5] summarized trial counsel's arguments, and recited some of the reasons Briley gave for his strikes. *Hightower I*, 365 F.3d at 1031. Turning to *Batson*, the majority "assumed that Petitioner had made a prima facie case of racial discrimination, thereby satisfying *Batson*'s first step," *id.*, 365 F.3d 1034, and that, at step two, "[t]he prosecutor satisfied his burden of production merely by *stating* nonracial reasons for his strikes." *Id.* (emphasis in original). Then, "[p]roceeding to the third and final step of the *Batson* analysis, we accept the finding of the Georgia courts that Hightower failed to 'establish purposeful discrimination.'" *Id.* The majority's "judgment [was] informed in great part by [its] recognition [of] the trial court's superior position to observe the prosecutor's 'credibility' and 'demeanor,' factors that bear strongly upon the ultimate question of whether the prosecutor discriminated." *Id.* Despite the fact that the trial judge had not expressly made credibility findings, the majority also used "credibility" to reject Petitioner's argument that pretense was shown when "the prosecutor did not strike white jurors who were as lukewarm on the death penalty as the black jurors he struck." *Id.* The majority wrote that "[i]t is extraordinarily difficult upon the basis of the cold record to compare different jurors' predispositions toward the death penalty. Because such determinations turn largely on discernable 'credibility,' *Wainwright v. Witt*, 469 U.S. 412, 429

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[5]The majority cited *Amadeo*, discussed *supra* n.1, and *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). 365 F.3d at 1031, n. 46. In *Horton*, the circuit court found that prosecutor Briley had admitted "that he was the author of a now infamous memo designed to underrepresent blacks, women and all individuals 18-24 years old on Putnam County's grand and traverse juries." *Horton*, 941 F.2d at 1456. In addition, Horton proved that between 1974 and 1981 in capital cases, Briley used nearly 80% of his peremptory strikes to remove black persons from jury service. 941 F.2d at 1457. "We therefore can reasonably infer that Mr. Briley was exercising his peremptory challenges in order to deny blacks the 'right and opportunity to participate in the administration of justice.'" *Id.*, at 1460 (citation omitted).

(1985), the trial judge's judgment is entitled to great deference." *Id.*, 365 F.3d at 1035.

Because of its reliance on these supposed trial court credibility determinations, and because it concluded that the AEDPA controlled, the majority denied relief.[6] It considered, but deemed unimportant, Briley's history of discrimination.[7]

Judge Wilson was not so sanguine. He was "quite concerned with the manner in which the state courts have applied *Batson* in this case. It appears that they have inappropriately condensed *Batson*'s three part inquiry into two, thereby risking a serious constitutional error." 365 F.3d at 1042 (concurring); *see also id* ("[a]n analysis of the state courts' opinions in this case raises the question of whether they properly applied *Batson*'s third step"). First, it was unclear what the trial court's approach to *Batson* actually was: "After improperly failing to find that a prima facie case had been established, the trial court proceeded to *Batson*'s second step-a step that it technically needn't have reached. Then, once it attempted to engage in *Batson*'s full inquiry, it failed by stopping short of *Batson*'s third step." 365 F.3d at. 1043, n. 2 (concurring). There was a parallel hole in the Georgia Supreme Court's opinion, in which

> it is unclear whether that court even reached and resolved *Batson's* third step at all. . . . **The language**

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[6] *See* 365 F.3d at 1033 ("Given our constraints under 28 U.S.C. § 2254"); 365 F.3d at 1034 ("[m]indful of our role in habeas proceedings"); 365 F.3d at 1035 ("Given our narrow scope of review....").

[7] The majority wrote: "[w]e recognize that these past [Briley] practices [detailed in *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)] are relevant to his discriminatory intent in the case at hand. *See Horton*, 941 F.2d at 1455. But our task is to determine, in consideration of '*all* relevant circumstances,' *Batson*, 476 U.S. at 96 (emphasis added), and given our constraints under 28 U.S.C. Section 2254, whether the state court judgment in this case runs afoul of federal law. We cannot say it does." 365 F.3d at 1035.

> **in the final two sentences. . . seems to suggest that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the *Batson* inquiry. . . . The Georgia Supreme Court appears to have been evaluating not whether Hightower had met his burden of establishing purposeful discrimination, but merely whether the prosecution's proffered reasons for the strikes were race-neutral.** The approach taken could inappropriately turn *Batson* into a test of the sufficiency of the prosecution's reasons for its strikes. **An entire additional step**, in which the strength of Hightower's case was weighed against the persuasiveness of the state's proffered reasons for the strikes, **appears to be missing** from this case.

365 F.3d at 1043(footnote omitted)(emphasis added) (concurring). Nevertheless, Judge Wilson concluded that the AEDPA required that relief be denied.[8]

6. Petition for Writ of Certiorari, and Remand in Light of *Miller-El II*.

On June 28, 2004, this Court granted the petition for writ of certiorari in *Miller-El II*. In November, 2004, before this Court decided *Miller El II*, Petitioner filed his petition for writ of certiorari. His first question presented was: "Whether the Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct a complete three-prong analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986) in evaluating Petitioner's claim that the prosecution purposefully excluded African-Americans from Petitioner's capital jury in violation of

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[8]Judge Wilson wrote that "our obligation to defer is great, and while it appears that the Georgia Supreme Court could have engaged in a more thorough inquiry as to Hightower' *Batson* claim, it has not affirmatively misstated federal law. 365 F.3d at 1044.

the Sixth and Fourteenth Amendments." In his first argument, Petitioner complained that "the Eleventh Circuit had failed to apply the third prong of the *Batson* analysis as established by this Court. ...," and had deferred to state court decisions that likewise "made no effort to determine whether prosecutor Briley exercised his peremptory strikes in a discriminatory manner to strike prospective black jurors, instead accepting Briley's proffered race-neutral reasons without further inquiry." A47-A49.[9] Petitioner then presented a comparative juror analysis showing the prosecutor's stated reasons for his strikes were pretextual.

On June 13th, 2005, this Court decided *Miller-El II*. This Court affirmed the importance of the third step in the *Batson* analysis because "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965)]. Some stated reasons are false." *Miller-El II*, 545 U.S. at 240. This Court termed "powerful" the *"side-by-side comparisons* of some black venire panelists who were struck and white panelists allowed to serve" and wrote that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar nonblack who is permitted to serve, that *is evidence tending to prove purposeful discrimination* to be considered at *Batson's* third step." *Id.* at 241 (emphasis added). The Court also affirmed the relevance of "broader patterns of

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[9]The petition went on to argue that

> [i]n evaluating *Batson* claims, courts must consider "all relevant circumstances" in determining whether the prosecution has exercised a peremptory strike for a discriminatory reason. *Batson*, 476 U.S. at 96-97. A consideration of all relevant circumstances may include, *inter alia*, comparing the attributes of stricken black jurors with those of seated white jurors.... Here, the Eleventh Circuit failed to question that *the trial court never conducted any analysis as required by Batson's third prong.*

practice," including "evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id.* at 253.

7. *Hightower II* Majority: *Miller-El II* is Irrelevant, Briley's Discriminatory History Cannot be Considered, Comparative Juror Analysis is Defaulted, and Silence by the Trial Court Judge Implicitly Completes the Third Step of *Batson*

On remand from this Court, the majority flatly stated that "*Miller-El* does not control our decision" and held that "[o]ur opinion in *Hightower v. Schofield* is accordingly reinstated." 459 F.3d at 1069, 1072. The reasons the majority gave for *Miller-El II's* purported irrelevance included "how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us." *Id.* at 1069. *Miller El II* relied upon evidence that had been developed in federal habeas corpus proceedings, but *Hightower* was "limited to the evidentiary record developed in state court during jury selection and the trial court's ruling, Hightower's and the state's briefs to the Supreme Court of Georgia (with respect to the *Batson* claim), and that court's opinion (again, with respect to the *Batson* claim.)." *Id.* at 1070.

According to the majority, the *Hightower* record from state court did not support a grant of relief for three reasons. First, in his brief on direct appeal to the Georgia Supreme Court, Petitioner did not expressly argue that a comparison of struck black jurors with seated white jurors revealed discrimination. Thus, "if Hightower wants the federal courts to entertain an argument he could have made in the Georgia Supreme Court but did not, he must establish cause for his counsel's failure to present the argument and resulting prejudice. He has

demonstrated neither." *Id.* (citation omitted).[10] Second, "Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors.'" *Id.*, 459 F.3d at 1071 (quoting *Hightower I*, 654 F.3d at 1035).[11] Third,

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[10]This holding by the majority marks the first time "default" had entered this case, indeed had even been mentioned, on the *Batson* issue. On remand from this Court, the lower court requested letter-briefs on the effect of *Miller-El II*. The state's letter brief contained no mention of "default" and instead defended the analysis by the majority in *Hightower I*. *See* A210-214. The majority in *Hightower I* ***had*** considered Petitioner's comparative juror analysis argument and had rejected it on the merits with no mention of any procedural impediment. 365 F.3d at 1035. By contrast, the majority in *Hightower II* claimed that the district court "ignored" the comparative juror analysis argument because it had not been presented to the state court. 459 F.3d at 1071, n. 7. But the district court on rehearing stated that the comparative juror analysis argument reflected simply a disagreement with the court's findings, never giving any indication at all that it would not consider comparative juror analysis, and did not suggest that it was prohibited from doing so. A208. Comparative juror analysis was presented by Petitioner, it was responded to by the state, and it was addressed by the district court. The state did not argue that comparative juror analysis was defaulted in its first brief in the circuit court, in its BIO in this Court pre-remand, or in its letter brief to the circuit court on remand.

[11]While this sentence was contained in *Hightower I*, its point was a temporal one rather than a global one. *After* the prosecutor stated his purported reasons for strikes, defense counsel did not offer *additional* evidence of discrimination. But, as even the state acknowledged in its letter-brief on remand, the *Hightower I* majority *did* discuss the evidence of discrimination that had been presented *before* the prosecutor's explanations: "In considering the totality of the circumstances for the purpose of analyzing the prosecutor's proffered reasons for striking African-American prospective jurors, this Court ... evaluated the prosecutor's reasons in light of the 'controversy [which] existed over the prosecutor's alleged role in a scheme to minimize the representation of minorities on local juries.' *Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004)." The state stressed that the lower court had written that "'[w]e are mindful of the harshness with which we criticized Briley in *Horton* for his past discriminatory practices. We recognize that these practices are relevant to his discriminatory intent in the case at hand. *See Horton*, 941 F.2d at 1455.'" A214. Like the freshly

and also new on remand, the trial judge's absolute *silence* on whether Briley's stated reasons for strikes were credible reflected that the trial court "implicitly *found* the prosecutor's race neutral explanations to be credible, thereby completing step three of the *Batson* inquiry." 459 F.3d at 1072, n. 9.

8. Judge Wilson and *Hightower II: Miller-El* Controls, Briley's History of Discrimination is Pertinent, Comparative Juror Analysis Was Not Defaulted, and Silence Does Not Satisfy Batson's Third Step.

Judge Wilson dissented because, "even more" than *Miller-El II,* this case "compels a finding" that *Batson* was violated. He explained that Miller-El had been required, under the AEDPA, to show by clear and convincing evidence that the state court's factual determinations were unreasonable in light of the evidence before the court. 459 F.3d at 1073 (dissenting).

> Hightower, on the other hand, does not. In *Hightower's* case, the trial court merely found that the prosecutor's justifications were "articulable" and "non-race" related and never touched on the credibility of those statements. The Georgia courts never made factual determinations regarding the

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minted "default," the majority minted a new view on Briley's history on remand: "[t]he only evidence Hightower attempted to present to the trial court in support of his *Batson* objection came in the form of a newspaper article [about the Supreme Court argument in *Amadeo* which] the trial court excluded. We are bound by that ruling and, as such, we do not consider that article as part of the record before the Georgia courts for the purposes of our review under § 2254(d)." *Hightower II*, 459 F.3d at 1071. The *Hightower II* majority then ignored, but could not erase, Briley's past and its record presence. While the article is not in the record, the comments by defense counsel that Briley was engaged in discriminating against blacks just like he had before was. And Briley's non-denial regarding rigging juries, as well as the judge's own "perfect familiarity" with the *Amadeo* case, remained before the judge. *See* text accompanying n. 1, *supra*.

> plausibility of the proffered justifications because they never applied the final step of *Batson*. Thus, the Georgia courts rendered a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). In light of the Georgia courts' error and the evidence presented to them, I would grant Hightower's habeas petition. 459 F.3d at 1073 (dissenting).[12]

a. State courts did not address Batson's step 3

Judge Wilson described the trial court's perfunctory, rote, second step *Batson* rulings, then pointed out that "*[t]he trial court never made a finding that these reasons were credible and never addressed 'the persuasiveness of the justification[s].*'" 459 F.3d at 1073-74(emphasis in original)(citation omitted)(dissenting). He observed that the Georgia Supreme Court did the same:

> Applying a clearly erroneous standard and assuming that Hightower had established a prima facie case, the Georgia Supreme Court affirmed the trial court's determination that the prosecutor's reasons for striking veniremembers were race-neutral. The language used in the Georgia Supreme Court's opinion suggests that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the *Batson* inquiry. The Georgia Supreme Court appears to have been evaluating not whether Hightower had met his burden of establishing purposeful discrimination, but merely

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[12]Judge Wilson explained that his change from "concurring" with "concerns" in *Hightower I*, to "dissenting" in *Hightower II*, was compelled by considering *Miller-El II*. He also considered this Court's intervening decision of *Rice v. Collins*, 126 S.Ct. 969 (2006). 459 F.3d at 1073 (dissenting).

> whether the prosecutor's proffered reasons for the strikes were race-neutral.

459 F.3d at 1074 (footnote omitted). Judge Wilson wrote that "[t]he conclusion is inescapable: By rejecting Hightower's *Batson* claim merely because the prosecutor's justifications were 'articulable' and 'nonrace related,' the Georgia courts' adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' *Batson*. § 2254(d)(1)." 459 F.3d at 1075 (dissenting).

b. The prosecutor's reasons were pretextual

Judge Wilson also disagreed with the majority's *sua sponte*, late-in-the-day announcement that comparative juror analysis had been "defaulted." "No Georgia court has ever found any part of Hightower's *Batson* claim procedurally barred, nor did the majority mention this as a ground for denying relief in the prior vacated opinion." 459 F.3d at 1076, n. 6 (dissenting).

Turning to the merits, Judge Wilson wrote that "[t]he record is replete with examples of veniremembers who were struck arguably because of their race, but three strikes are especially troubling, specifically the exercise of peremptory challenges to eliminate Thelma Butler, Ricky Thomas, and Emerson Davis." 459 F.3d at 1076 (dissenting). With respect to Thelma Butler, Judge Wilson wrote:

> Briley claims that he struck Thelma Butler because he successfully prosecuted her brother-in-law twelve years prior. He also claims that Butler was somewhat hostile. From the record, it appears that Butler was an ideal juror for a prosecutor seeking the death penalty. Butler felt that people tried for murder are treated too leniently. She was strongly in favor of the death penalty. She felt that mitigating circumstances must be proven before she would consider imposing a life

> sentence. Her answers alone undermine the veracity of Briley's proffered justification, especially since he never questioned Butler about her brother-in-law. Even more striking is the fact that Briley declined to strike a non-black juror, Michael Hensler, who, himself, had been convicted of and imprisoned for voluntary manslaughter by Briley"s office.

Id. With respect to Ricky Thomas, Judge Wilson wrote:

> In another example, Ricky Thomas's father had been convicted of killing his mother. Because of this conviction and the fact that Thomas had lived with his father after his father's release, the prosecutor struck him speculating that Thomas may possibly identify his father's case with Hightower's. Yet, Thomas indicated that he was in favor of the death penalty, and that he did not even remember the circumstances surrounding his mother's killing because he was too young at the time. The prosecutor never questioned Thomas about his relationship with his father or the potential impact on his ability to decide the case fairly. Again, the pretext is more apparent when viewed in light of the fact that Hensler was not struck.

459 F.3d at 1076 (dissenting). With respect to Emerson Davis:

> Emerson Davis was struck because the prosecutor claimed that Davis was somewhat opposed to the death penalty, more so than other veniremembers. Davis never stated that he was opposed to the death penalty, but rather had to hear the case before imposing the penalty. The prosecutor mischaracterized his voir dire, thereby undermining a claim that the prosecutor's reason was race-neutral. In fact, Davis's views were in line with several non-black jurors whom the prosecutor declined to challenge. If Davis was undesirable as compared to other

> veniremembers on the question about the death penalty, then the prosecutor would have used his remaining peremptory strikes to eliminate other veniremembers who gave similar answers. However, the non-black veniremembers who gave similar answers were not struck.

459 F.3d at 1076-77 (footnote omitted)(dissenting).

Morever, Judge Wilson did not dodge Briley's prior history of racial discrimination, and faulted the majority for doing so. For Judge Wilson, it was obvious that the trial court was put on notice when defense counsel argued that Briley had "'in the past shown a bent and scheme to keep down the [] number of blacks' serving on jury panels, and claimed that Briley wrote a memorandum detailing a plan to limit the number of blacks on grand juries." 459 F.3d at 1078 (dissenting). Especially telling was that "[i]nstead of denying involvement with the memorandum, Briley responded to the accusations arguing that the memorandum could be viewed as an effort to improve matters." *Id.* (dissenting). After considering Briley's history and the comparison of struck black jurors to seated white jurors, Judge Wilson concluded: "[t]his case is a more factually compelling *Batson* violation than *Miller-El* because of Briley's personal history of past discrimination." 459 F.3d at 1077 (dissenting).

REASONS FOR GRANTING THE WRIT

I. DESPITE *MILLER-EL II*, THERE IS A SPLIT IN THE CIRCUITS REGARDING WHEN COMPARATIVE JUROR ANALYSIS MUST BE RAISED OR WILL BE FOUND WAIVED; AND THE MAJORITY BELOW CONFLICTS WITH *MILLER-EL II* AND MISCONSTRUES THE RECORD

This Court remanded *Hightower I* for consideration in light of *Miller El II.* The majority on remand *refused* to consider this

case in light of *Miller-El II* because "*Miller-El* does not control our decision" and "our opinion in *Hightower v. Schofield* is accordingly reinstated." *Hightower v. Terry*, 459 F.3d 1067, 1069, 1072 (11th Cir. 2006). This push back was explained by the majority's contentions that Petitioner had not expressly argued comparative juror analysis on direct appeal and so could not do so in federal court.[13] *Miller El II* was different, wrote the majority, because in *Miller-El II* the circuit court considered both comparative juror analysis and evidence adduced at a district court hearing.

The Eleventh Circuit's magical post-remand-procedural-default-escape-valve from *Miller El II* is in direct conflict with the Ninth Circuit's holding in *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006). It also ignores the dispositive language from the very opinion the circuit was ordered to consider, *Miller El II.*, and ignores the state court record.

A. There is a conflict between the Eleventh and the Ninth Circuits.

Since this Court's decision in *Miller El II*, the Ninth Circuit has revisited the question of whether an appellate court must consider comparisons between struck black jurors and seated white jurors even when such comparisons were not expressly addressed to the trial court. Prior to *Miller El II*, a Ninth Circuit panel held "no." After *Miller-El II*, upon a petition for rehearing, citing *Miller El II*, the court reversed itself. *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006):

> In our first *Boyd* opinion, we held that *Batson* does not compel a court to conduct comparative juror analysis for the first time on appeal. *Boyd*, 393 F.3d at 1015. ...But after *Miller-El II*, we recognize that our previous reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis

[13] In *Hightower I* before this Court's remand, the majority below had considered comparative juror analysis, default-free.

> on appeal. In *Miller-El II* .... the Supreme Court ... looked beyond the evidence that *Miller-El* had presented to the trial court and conducted a comprehensive comparative juror analysis on appeal. *Id.* at 2325-38 & 2326 n. 2. Accordingly, the California courts' view that comparative juror analysis can take place on appeal only when the trial court engaged in such analysis in the first instance has been called into question.

467 F.3d 1139, 1149 (2006). On January 24, 2007, Warden Newland filed a petition for writ of certiorari in this Court seeking review of the Ninth Circuit's decision in *Boyd*. Included in the reasons for granting the writ is the conflict between the Ninth Circuit and the Eleventh Circuit's *Hightower II* decision. Petition at 11.[14] *See also Kesser v. Cambra*, 465 F. 3d 351 (9th Cir. 2006) (factual basis for comparative juror analysis is the voir dire record, which is part of the evidence presented in the state court proceeding, and *Miller El* establishes that comparative juror analysis is required even when it was not requested or attempted in the state court); *Brown v. Del Papa*, 2006 U.S. App LEXUS 28418 (9th Cir. 11/13/06) (following *Boyd*, under *Batson's* third step, "comparative [juror] analysis is required [in federal habeas proceedings] even when it was not requested or attempted in state court" because "the third step of *Batson* primarily involves the trier of fact."). *Boyd* and *Hightower II* conflict.

B. The majority below ignored the *Miller El II* finding that a *Batson* analysis inherently includes comparing jurors

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[14]The question presented in *Boyd* is: " Whether, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), a state court reasonably applies *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by declining to undertake comparative analysis of challenged and non-challenged jurors for the first time on appeal." Petition at i.

In *Miller-El II*, this Court considered comparative juror analysis that had not been expressly presented to the state courts: "Miller-El did not argue disparate treatment or disparate questioning at the *Batson* hearing . . .." *Miller-El II*, 545 U.S. at 280 (Thomas, J., joined by Roberts, C.J., and Scalia, J., dissenting). This Court noted that "the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence..... **There can be no question that the transcript of the voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts.**" *Miller El II*, 545 U.S. at 241 (emphasis added).

The majority below wrote that because Petitioner did not include an express comparative juror analysis in his brief on direct appeal, "if Hightower wants the federal courts to entertain an argument he could have made in the Georgia Supreme Court but did not, he must establish cause for his counsel's failure to present the argument and resulting prejudice. He has demonstrated neither." 459 F.3d at 1072 (citation omitted). This flatly ignores the remand in light of *Miller-El II*.[15]

C. The majority below ignored the record evidence of Briley's history of race discrimination, contrary to *Miller-El II*, and ignored record evidence of comparative juror analysis

Equally irreconcilable with this Court's decision in *Miller El II* was the majority's refusal to consider the probative value of Briley's history of racial discrimination. The majority devoted extraordinarily little text to why it would not consider

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[15]As Judge Wilson noted: "No Georgia court has ever found any part of Hightower's *Batson* claim procedurally barred, nor did the majority mention this as a ground for denying relief in the prior vacated opinion." 459 F.3d at 1076 (dissenting).

extremely probative information: "We analyzed Hightower's *Batson* claim in the same fashion, and concluded, as the district court did, that 'Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors.'" 459 F. 3d at 1071 (citation omitted)(footnote omitted). The elaborating footnote, only slightly longer, was affirmatively misleading in its claim that "[t]he only evidence Hightower attempted to present to the trial court in support of his *Batson* objection came in the form of a newspaper article," *id.*, at 1071, n. 8, which the trial court excluded for lack of authentication.

As Judge Wilson's dissent pointed out, the unauthenticated newspaper article was *not* the "only evidence" the trial court had concerning Briley's penchant for discrimination; it also had, on the record, defense counsel's assertion that Briley had authored a memo describing how to minimize the number of African Americans who served on Georgia juries, and Briley's telling response, which "disput[ed] the memorandum's purpose, [but] essentially admitted penning the memorandum . . .." 459 F.3d at 1075, n. 5 (dissenting). And both the prosecutor and the defense attorney reminded the presiding judge of his familiarity with the *Amadeo* case in which this Court later unanimously reversed a conviction and death sentence from the very same court and county on the basis of Briley's discriminatory actions. *See* text accompanying note 1, *supra*.

Judge Wilson found that this evidence of prior discrimination was greater than that this Court deemed probative in *Miller El II*, because in *Miller El II*, there was no evidence of discrimination by the actual prosecutors in Miller-El's case. Here, Briley himself authored a memorandum that spelled out the scheme to limit the number of blacks in the jury pool.

Had the majority conducted a comparative juror analysis[16] and considered the record evidence of prior discrimination by the prosecutor, the results would have been unambiguous. Judge Wilson felt himself compelled by this Court's remand order both to conduct a comparative juror analysis and to consider Briley's history, and after doing so, compelled to conclude that Briley's explanations were pretextual.

The majority's belated, strained, finding of default, like its erroneous assertion that the record contained no evidence of prior discrimination, appears to be calculated to avoid rather than consider *Miller-El II*. As Judge Wilson protested, "Reinstating the prior panel opinion violates the Supreme Court's express mandate." 459 F.3d at 1078 (dissenting).

II. THE LOWER COURT MAJORITY (AGAIN) CONFLATED STEPS TWO AND THREE OF THIS COURT'S MANDATED, SEPARATE, THREE-STEP *BATSON* INQUIRY.

A prosecutor may be committed to under-representing African Americans, blacks, women, and young people on juries, and may exercise 80 % of his peremptory challenges to eliminate African-American jurors in a particular case, yet still be capable of articulating a race-neutral reason for any given strike. However, as this Court explained in *Miller-Ell II*: "Some stated reasons are false." *Miller-El II*, 545 U.S. at 240. Thus, after a prosecutor delivers a facially neutral reason for a

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[16]Prosecutor Briley himself injected comparative juror analysis into the "totality of the circumstances" mix when, as part of his justification for striking African-American jurors, he "stated that Mr. Davis had appeared 'somewhat [more] opposed to the death penalty' than other prospective jurors." *Hightower I*, 365 F.3d at 1032. The majority did not repeat this quote or line from its *Hightower I* opinion when it wrote in *Hightower II*, that comparative juror analysis had been "defaulted." Such an analysis was expressly before the trial court judge, it was part of the record on appeal, and the majority below simply failed to follow *Miller-El II*.

strike, the trial court is obliged to "assess the plausibility of that reason in light of all evidence with a bearing on it." *Id.*, at 252.

Neither the trial court judge, nor the Georgia Supreme Court, expressly "assess[ed] the plausibility" of prosecutor Briley's stated reasons for any of his six strikes removing African-Americans from service on Petitioner's capital jury. With respect to each of Briley's stated reasons, the trial court judge simply responded: "the state has stated an articulable reason for striking juror [fill in the blank] and the reason is not race related." This Court stated in *Miller-El II* that a prosecutor's "facially neutral reason" does not "suffice to answer a *Batson* challenge." 545 U.S. at 240. As Judge Wilson concluded in dissent below, these statements by the trial court judge did not entail "determinations regarding the plausibility of the proffered justifications" and "[t]hus, the Georgia courts rendered a decision that was 'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1)" 459 F.3d at 1073 (dissenting).[17]

The majority, however, wrote that the trial court judge's *silence* on whether Briley's stated reasons for prohibiting black juror participation were credible reflected that the trial court "implicitly *found* the prosecutor's race neutral explanations to

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[17]Counsel for the state did not in legal briefs or argument in state court acknowledge that *Batson* requires, or urge a court to perform, a three step process. In its brief on direct appeal, the state urged affirmance because "the trial court, after conducting a hearing in accordance with *Batson v. Kentucky*, properly held that there had been no systematic exclusion of blacks from the jury." Then counsel described two things that had occurred: 1) the defendant had told the trial court judge that Briley had used six of seven challenges against black people; and 2) Briley had offered a neutral explanation for each strike. The state made no suggestion that there was a third thing that the trial court had done, or that the state supreme court should do. Indeed, the state successfully argued that searching of the record in furtherance of a step three analysis was improper because the trial court's decision was not clearly erroneous. Likewise, in its initial brief in the Eleventh Circuit, the state did not mention three steps.

be credible, thereby completing step three of the *Batson* inquiry." 459 F.3d at 1072, n. 9. This is contrary to *Batson* and its progeny, and side-stepped this Court's remand in light of *Miller-El II*.[18] If silence were sufficient to rebut "a defendant's prima facie case, the Equal Protection Clause 'would be a vain and illusory requirement.'" *Batson,* 476 U.S. at 598 (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935).[19]

The majority below explained that "a trial court's dispositive ruling may contain implicit findings, which, though unstated, are necessary to that ruling." 459 F.3d at 1072, n. 9. "The trial court ... expressly found that the prosecutor had provided an 'articulable, nonrace related reason' for each strike, and overruled Hightower's *Batson* objection. *The trial court's overruling of Hightower's Batson objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. Id.* (emphasis added).[20]

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[18]The question presented in Hightower's first petition to this Court was: "Whether the Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct a complete three-prong analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986)." In his first argument under "reasons for granting the writ," Petitioner wrote: "the Eleventh Circuit had failed to apply the third prong of the *Batson* analysis as established by this Court." Presumably, this case was remanded because *Miller-El II* was relevant to what the lower court had done. By holding that *Miller-El II* was not relevant, the majority again abjured a step three analysis.

[19]In addition to conjuring up a step three, the majority made Briley's history of race discrimination disappear in *Hightower II*. *See* text accompanying n. 1, *supra*. In *Amadeo, supra*, this Court unanimously reversed the Eleventh Circuit's procedural reasons for not checking Briley's racism. It appears that it is left to this Court to do so again.

[20] It would have defied logic *only* if the judge believed that a prosecutor had to do more than provide a race-neutral reason in order to satisfy *Batson*. Counsel for the state told the Supreme Court justices that "the prosecution adequately met its burden of proof at trial when it volunteered a neutral, clear, and specific explanation for each challenge," *see* A222, and the state court record reflects that this what the judge actually believed as well. The judge did not sit and ponder "the whole of the voir

Judge Wilson in dissent rejected the majority's suggestion that the trial court judge implicitly addressed step three because "[i]mplicit findings must be 'reasonable in light of the record evidence.'" 459 F. 3d at 1074(citation omitted)(dissenting). He criticized the majority for failing to "evaluate the record to determine whether its implicit findings are reasonable," and upon his own such evaluation, concluded that "the record fails to support a finding that the prosecutor's reasons were credible." *Id.*, at 1074-75.

"The [AEDPA] standard is demanding but not insatiable; as [this Court] said the last time this case was here, 'deference does not by definition preclude relief.'" *Miller-El II*, 545 U.S. at 240. Whatever its precise limits, deference does not reach so far as to permit the transformation of silence into implicit findings without consideration of whether those implicit findings have support in the record. This Court granted certiorari once to mark those limits and should do so again to enforce them.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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dire testimony subject to consideration," *Miller-El II*, 545 U.S. at 252, or suggest that he was filtering through "all relevant circumstances" in his mind. *Batson*, 476 U.S. at 96-97. Nothing suggests that this judge engaged in "'a sensitive inquiry into such circumstantial and direct evidence of [discriminatory] intent as may be possible.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)). On the contrary, immediately after the state finished a "reason," the judge said that it was "articulable" and that it was not "race-related." This happened six times in rapid succession, and while the judge's description of what he had just heard was apt, the judge did not pretend that he was doing any more than describing what the record already reflected.

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APPENDIX

A1

John Washington HIGHTOWER,
Petitioner-Appellant,

v.

William TERRY,
Respondent-Appellee,

United States Court of Appeals,
Eleventh Circuit.

Aug. 8, 2006.

Background: Following affirmance on appeal for defendant's state convictions for murder and imposition of the death penalty, defendant filed petition for writ of habeas corpus. The United States District Court for the Middle District of Georgia, No. 96-00097-3-CV-DF, Duross Fitzpatrick, J., denied his application and the Court of Appeals. 365 F.3d 1008, affirmed. Certiorari was granted. The Supreme Court vacated judgment, and remanded to the Court of Appeals for further consideration in light of the Court's decision in *Miller-El v. Dretke.*

Holdings: On remand from the United States Supreme Court, the Court of Appeals, Tjoflat, Circuit Judge, held that petitioner's failure to allege in his habeas petition to the district court that counsel were ineffective in the state supreme court for failing to advance his comparisons of black jurors struck by the prosecutor to white jurors accepted by the prosecutor precluded federal habeas court from entertaining the argument.

Reinstating 365 F.3d 1008.

Wilson, Circuit Judge, dissented and filed opinion.

Mark L. Whitaker, John C. Peirce (Court–Appointed), Timothy Keith Armstrong (Court–Appointed), Howrey, Simon, Arnold & White, LLP, Washington, DC, for Hightower.

Susan V. Boleyn, State Law Dept., Atlanta, GA, for Terry.

Appeal from the United States District Court for the Middle District of Georgia.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before TJOFLAT, ANDERSON and WILSON, Circuit Judges.

TJOFLAT, Circuit Judge:

Petitioner John Washington Hightower is a Georgia prison inmate awaiting execution for murder.[1] On August 6, 1999, the United States District Court for the Middle District of Georgia denied his application for writ of habeas corpus under 28 U.S.C. § 2254, and, on April 12, 2004, we affirmed its decision. *Hightower v. Schofield,* 365 F.3d 1008 (11th Cir. 2005).[2] Hightower thereafter petitioned the Supreme Court for certiorari review. One of the issues his petition raised was whether the state trial court erred in rejecting his

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[1] Hightower was convicted in 1988 of murdering his wife and two step-daughters the year before. He was sentenced to death for each killing.

[2] Our opinion in *Hightower* describes Hightower's criminal acts and the procedural history of the case---in state and federal court.

claim that the prosecutor's peremptory challenges of black jurors violated the *Batson* rule. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[3] The Court granted Hightower's petition, vacated our judgment, and remanded the case "for further consideration in light of" *Miller–El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). *Hightower v. Schofield,* ____ U.S. ___, 125 S.Ct. 2929, 2929-30, 162 L.Ed.2d 863 (2005). We conclude that *Miller–El* does not counsel a decision contrary to the one we reached in *Hightower v. Schofield,* and therefore adhere to that decision.

Why *Miller–El* does not control our decision becomes clear when one considers how *Miller–El* reached the Supreme Court and how *Hightower v. Schofield* came to us. In *Miller–El,* after the Texas Court of Criminal Appeals affirmed the trial court's determination that the prosecutor's peremptory challenges of black jurors were not racially motivated, Miller–El petitioned the United States District Court for the Southern District of Texas for habeas relief—to

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[3] In *Batson*, the Supreme Court held that the Equal Protection Clause of the 14th Amendment forbad the State from exercising peremptory strikes in a racially discriminatory manner during jury selection in a criminal prosecution. The Court established a three-part mechanism for establishing such discrimination, which the Court has summarized as follows:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a raceneutral explanation (step two). If a raceneutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

review the court of criminal appeals' *Batson* decision.[4] *Miller–E4* 125 S.Ct. at 2323. Instead of requesting the district court to review that decision on the basis of the record created before the Texas trial judge, Miller–El asked the court to augment that record to consider other evidence, including juror questionnaires and juror information cards. *Id.* at 2334 n. 15. The State had no objection; the district court[5] therefore convened an evidentiary hearing to consider the additional evidence. *Id.* The court rejected Miller–El's *Batson* claim, choosing to defer to 'the experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination." *Miller–El v. Johnson*, No. Civ. 3:96–CV-1992–H, slip. op. at 2, 2000 WL 724534 (N.D. Tex. 2000) (mem.) (unpublished). Miller–El appealed, and the Fifth Circuit affirmed. *Miller–El v. Dretke*, 361 F.3d 849, 862 (5th Cir.2004). Of relevance to the case before us, the court of appeals rejected the petitioner's arguments that 'the . . . similarity between non-black venire members who were not struck by the prosecution and six blacks who were" and the prosecutor's "disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment" constituted circumstantial evidence of the prosecutor's intent to discriminate against the black members on account of their race. *Id.* at 854-55.

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[4] Miller-El's petition sought relief on other constitutional claims as well. *Miller-El*, 125 S.Ct. at 2323. None are relevant here.

[5] The district court referred Miller-El's petition to a magistrate judge. After hearing the petitioner's claims, the magistrate judge issued a report and recommendation, recommending that the district court deny relief. *Miller-El v. Johnson*, No. Civ. 3:96-CV-1992-H, slip. Op. at 1, 2000 WL 724534 (N.D. Tex. 2000) (mem.) (unpublished). The court adopted the magistrate judge's recommendations and findings, with modifications not relevant here. *Id.* at 2.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834 (1995).

The Supreme Court disagreed with the Fifth Circuit's assessment of the evidence contained in the record, i.e., the record before the Texas trial judge *and* the evidence Miller—El presented to the district judge with the State's consent; the Court concluded that "when the evidence on the issues [the petitioner] raised is viewed cumulatively its direction is too powerful to conclude anything but [racial] discrimination." *Miller-El*, 125 S.Ct. at 2339.

In the case at hand, we did not decide Hightower's *Batson* claim on the basis of an augmented record, as the district court, the court of appeals, and the Supreme Court did in *Miller-El*; rather, we were, and are *post-Miller-El*, limited to the evidentiary record developed in the state trial court during jury selection and the trial court's ruling,[6] Hightower's and the State's briefs to the Supreme Court of Georgia (with respect to the *Batson* claim), and that court's opinion (again, with respect to the *Batson* claim).

The procedural history of this case is illustrative. After the Georgia Supreme Court affirmed his convictions and death sentences, Hightower petitioned the state superior court for a writ of habeas corpus. Among his claims was the *Batson* claim he had presented to the supreme court in

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6 In *Miller-El*, the Court, addressing the propriety—under 28 U.S.C. § 2254(d)(2)—of considering evidence not presented to the trial judge when ruling on the petitioner's Batson objection, stated that it was reaching no decision about whether the limitation on evidence in § 2254(d)(2) is waiveable. *Miller-El*, 125 S.Ct. at 2334 n. 15. Section 2254(d)(2) instructs federal habeas courts to consider only 'the evidence presented in the State court proceeding," i.e., the proceeding in which the Batson objection is raised

appealing his convictions. The superior court declined to entertain the *Batson* claim, citing *Gunter v. Hickman,* 256 Ga. 348 S.E.2d 644 (Ga.1986), which held that issues raised in a defendant's direct appeal of his conviction cannot be relitigated on collateral attack, in a habeas corpus proceeding, *see Gunter* 256 Ga. at 348 S.E.2d at 644. After the superior court denied relief (on all of the petition's claims), the Georgia Supreme Court denied Hightower's application for probable cause to appeal, and the Supreme Court denied his petition for a writ of certiorari, *Hightower v. Thomas,* 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995).

Having exhausted his state remedies, Hightower filed the instant habeas petition. The petition contained several claims, including the *Batson* claim now under consideration pursuant to the Supreme Court's mandate. In his petition and supporting memoranda, Hightower presented his *Batson* claim as he had presented it earlier in his brief to the Georgia Supreme Court on direct appeal, but he added an argument he had omitted from his brief to the Supreme Court. He contended that if the district court compared the prosecutor's questions to the white jurors with those put to the black jurors, or vice versa, and the respective jurors' answers to those questions, it would become apparent that the prosecutor, in exercising his peremptory challenges, was discriminating against the black jurors because of their race. The district court ignored this additional argument; it denied Hightower's *Batson* claim with these words:

> Petitioner has easily satisfied the first two prongs of his prima facie burden under *Batson;* the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily

> struck certain jurors because of their race. The trial court, having the best opportunity to view the prosecutor's demeanor and determine his credibility, found the prosecutor's explanations to be credible. The trial court also found there to be a race-neutral basis for all of the prosecutor's peremptory challenges of black prospective jurors. The Georgia Supreme Court affirmed the trial court's evaluation. This Court cannot say that the Georgia Supreme Court's determination was unreasonable or contrary to *Batson* or any other Supreme Court case within the meaning of the [Antiterrorism and Effective Death Penalty Act]. Accordingly, Petitioner is not entitled to relief on this basis."[7]

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[7] In determining whether the Georgia Supreme Court's rejection of Hightower's *Batson* claim should be sustained, the district court focused on what was before the Georgia Supreme Court. In other words, to the extent that Hightower's petition contained an argument that Hightower did not present to that court, the district court ignored the argument. The Rules Governing Section 2254 Cases in the United States District Courts accommodate this policy of limiting the district court's examination of the state high court's decision to what was before the high court. If the district court orders the State to respond to a habeas petition, Rule 5(c) requires the State to attach to its answer "parts of the transcript that the [State] considers relevant." Where, as here, a *Batson* claim is involved, the State must attach the transcript of the portions of the trial dealing with jury selection (and the *Batson* objection). The State provided the entire transcript of the jury selection in this case. Rule 5(d) also requires the State to attach to its answer the briefs the petitioner and the State submitted to the state appellate court, and that court's "opinions and dispositive orders" relating to the petitioner's claim(s). The State provided the district court with these materials in this case. In sum, the district court, in examining, and denying, Hightower's *Batson* claim, relied on transcript of the jury selection, the parties' briefs to the Georgia Supreme Court, and that court's dispositive opinion.

We analyzed Hightower's *Batson* claim in the same fashion, and concluded, as the district court did, that "Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors."[8] *Hightower v. Schofield*, 365 F.3d at 1035.

Hightower contends that *Miller-El* required the district court, and this court, to entertain the argument he presented to the Georgia Supreme Court as well as the additional argument presented to the district court—that the comparison mentioned above of the prosecutor's handling of the white and black jurors compels the inference that the prosecutor exercised his peremptory challenges on racial grounds. In effect, he wants to re-brief his appeal to the Georgia Supreme Court. We assume that he intended to do just that when he included his *Batson* claim in his habeas petition to the state superior court. The superior court rejected his attempt; the supreme court had adjudicated the claim, and state procedural law precluded him from relitigating it on collateral attack. The Georgia Supreme Court effectively agreed when it denied Hightower's application for probable cause to appeal.

The net effect of these rulings is that if Hightower wants the federal courts to entertain an argument he could have made in the Georgia Supreme Court but did not, he

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[8] The only evidence Hightower attempted to present to the trial court in support of his *Batson* objection came in the form of a newspaper article, which purportedly showed that the prosecutor had authored a memorandum detailing a scheme to exclude black persons from juries. The trial court excluded the newspaper article from the record, on the ground that it had not been authenticated. We are bound by that ruling, and, as such, we do not consider the article as part of the record before the Georgia courts for the purposes of our review under § 2254(d).

must establish cause for his counsel's failure to present the argument and resulting prejudice. *See Francis v. Henderson,* 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976). He has demonstrated neither. Although his habeas petition to the district court alleges that his lawyers denied him effective assistance of counsel, it does not allege that counsel were ineffective in the Georgia Supreme Court for failing to advance his comparisons of black jurors struck by the prosecutor to white jurors accepted by the prosecutor.

We have considered *Miller-El* in the context of the instant case. We conclude that it does not change our disposition of Hightower's *Batson* claim.[9] Our opinion in *Hightower v. Schofield* is accordingly reinstated.

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[9] Although *Miller-El* involved only the application of § 2254(d)(2), *Miller-El*, 125 S.Ct. at 2325, the dissent contends that we should grant Hightower's writ of habeas corpus on the ground that the Georgia courts' rejection of Hightower's *Batson* claim constituted a decision "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law" under § 2254(d)(1). *See post,* at 1073. The dissent argues that the state courts rendered such a decision because the trial court, and the Georgia Supreme Court on appeal, failed to carry out *Batson's* third step in that they failed to find credible the prosecutor's race-neutral explanations for striking black jurors. *See id.; see also Rice v. Collins,* — U.S. —, 126 S.Ct. 969, 974, 163 L.Ed.2d 824 (2006) ('third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor . . . ." (citations and internal quotation marks omitted)). In so doing, the dissent focuses on the trial court's language in overruling Hightower's *Batson* objection, in which it stated only that, "as to each individual strike, the State has presented an articulable nonrace related reason for striking the prospective juror."

The dissent fails to recognize, however, that a trial court's dispositive ruling may contain implicit findings, which, though unstated, are necessary to that ruling. *See United States v. $242,484.00,* 389 F.3d

SO ORDERED.

WILSON, Circuit Judge, dissenting:

I dissent from the order reinstating our previous opinion because this case, even more than *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), compels a finding that *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was violated. *Miller-El* came to the Supreme Court on review "following

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1149, 1154 (11th Cir. 2004) (en banc) ("[W]e and other federal appellate courts have 'inferred from a district court's explicit factual findings and conclusion implied factual findings that are consistent with its judgment although unstated.'"); *see also* 9A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 2579 (2d ed. 1995) ("In some cases if the court fails to make a finding on a particular fact it has been assumed . . . that it impliedly made a finding consistent with its general finding."). In such cases, we make 'the common sense judgment that material factual issues were resolved by the [trial] court in favor of the judgment when it was reasonable for that court to [have] do[ne] so in light of the evidence." *$242,484.00* at 1154-55. We have invoked (albeit tacitly) this principle in two *Batson* appeals, *United States v. Cure*, 996 F.2d 1136 (11th Cir.1993), and *United States v. David*, 844 F.2d 767 (11th Cir.1988), in which we upheld a district court's overruling of a *Batson* objection even though the district court did not explicitly find the prosecutor's race-neutral explanations to be credible. *See Cure*, 996 F.2d at 1138-39; *David*, 844 F.2d at 769.

In this case, the trial court, after assuming that Hightower had made out a prima facie case of racial discrimination, expressly found that the prosecutor had provided an "articulable, nonrace related reason" for each strike, and overruled Hightower's *Batson* objection. The trial court's overruling of Hightower's *Batson* objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make 'the common sense judgment"—in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling—that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry.

the Texas trial court's prior determination of fact that the State's race-neutral explanations [for striking black veniremembers] were true." 125 S.Ct. at 2325. The trial court in *Miller–El* specifically found that the prosecutor's justifications for striking black veniremembers were "completely credible [and] sufficient" to support a finding of "no purposeful discrimination." 125 S.Ct. at 2323. The Supreme Court, reviewing the case under the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), stated that "Miller–El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."" *Id.* at 2325 (quoting 28 U.S.C. § 2254(d)(2)). To prevail, Miller–El was required to prove "by clear and convincing evidence" that the factual determination was unreasonable. *Id.*; 28 U.S.C. § 2254.

Miller–El had to overcome a difficult burden (clear and convincing evidence); Hightower, on the other hand, does not. In Hightower's case, the trial court merely found that the prosecutor's justifications were "articulable" and "nonrace related" and never touched on the credibility of those statements. The Georgia courts never made factual determinations regarding the plausibility of the proffered justifications because they never applied the final step of *Batson*. Thus, the Georgia courts rendered a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). In light of the Georgia courts' error and of the evidence presented to them, I would grant Hightower's habeas petition.

I. THE GEORGIA COURTS FAILED TO APPLY *BATSON'S* THIRD STEP

When we initially decided this case, I concurred with the result but expressed reservations about the state courts' application of *Batson*. *See Hightower v. Schofield,* 365 F.3d 1008, 1041 (2004) (*"Hightower I"*) (Wilson, J., concurring). As I stated in my concurrence, it appeared that the state trial court and the Georgia Supreme Court failed to properly apply *Batson's* third step by concluding their analysis at the end of the second step. *Id.* at 1042.

A *Batson* challenge requires a three-step inquiry. *Rice v. Collins*, — U.S. —, 126 S.Ct. 969, 973, 163 L.Ed.2d 824 (2006). "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question." *Id.* (citations omitted). The second step requires evaluating the explanation on its face—"so long as the reason is not inherently discriminatory, it suffices." *Id.* Third, the trial court must "assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller–El*, 125 S.Ct. at 2331. 'this final step involves evaluating the persuasiveness of the justification" proffered by the prosecutor . . ." *Rice*, 126 S.Ct. at 974 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam)). The Georgia courts did not apply *Batson's* third step.

The trial court made explicit determinations with regard to only the first two steps.[10] The trial court asked the

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[10] The trial court found that Hightower failed to establish a prima facie case of discrimination. That determination is erroneous. *See Hightower*

prosecutor, Joseph Briley, about each struck black veniremember, starting with Ricky Thomas. After Briley offered his justification, the trial court immediately stated, without asking for the defendant's input, "Mr. Briley, I find that is an articulable reason the State has stated for striking Ricky Thomas and is not race related." The trial court then proceeded to ask about the next potential juror. Again after Briley's explanation, the trial court, without pausing, found that 'the State has stated an articulable reason for striking Lucious Boswell and the reason is not race related." The trial court and Briley repeated this sequence for each of the six struck black veniremembers. Finally, after hearing all the prosecutor's reasons, the court stated, "I find that the defendants have failed to establish a prima facie case of discrimination on the part of the district attorney. I further find that as to each individual strike, the State has presented an articulable, nonrace related reason for striking the prospective juror." *The trial court never made a finding that these reasons were credible and never addressed 'the persuasiveness of the justification[s].'* *Purkett,* 514 U.S. at 768, 115 S.Ct. at 1771.

The Georgia Supreme Court also failed to reach *Batson's* final step. Applying a clearly erroneous standard and assuming that Hightower had established a prima facie case, the Georgia Supreme Court affirmed the trial court's determination that the prosecutor's reasons for striking veniremembers were race-neutral. The language used in the Georgia Supreme Court's opinion suggests that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is

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I, 365 F.3d at 1043 (Wilson, J., concurring). Both the majority, here, and the Georgia Supreme Court assumed for purposes of analysis that Hightower established a prima facie case of discrimination.

sufficient to end the *Batson* inquiry.[11] The Georgia Supreme Court appears to have been evaluating not whether Hightower had met his burden of establishing purposeful discrimination, but merely whether the prosecutor's proffered reasons for the strikes were race-neutral.

The majority says that the trial court *implicitly* reached the final step. *Ante,* 1072 n. 9. I disagree. Implicit findings must be "reasonable in light of the record evidence." *United States v. $242,484.00*, 389 F.3d 1149, 1154-55. The majority does not evaluate the record to

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[11] The Georgia Supreme Court's entire discussion of Hightower's *Batson* claim is as follows:

> The defendant contends the prosecution was guilty of racial discrimination. The prosecutor used only seven of his authorized 10 peremptory strikes. He used six of those seven strikes against black prospective jurors. The record shows that at least two black prospective jurors were struck by the defendant after having been accepted by the prosecutor. The prosecutor explained his peremptory challenges. Four of the challenged prospective jurors were closely related to persons convicted of serious felonies. The other two were conscientiously opposed to the death penalty, although not to the extent they were excused for cause. The trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie case, the trial court's determination is not clearly erroneous.

Hightower v. State, 259 Ga. 770, 773, 386 S.E.2d 509, 512 (1989) (citations omitted). The Georgia Supreme Court used the words "legitimate" and "non-racial" when paraphrasing the trial court's findings regarding to the prosecutor's proffered reasons, but the trial court stated that for each struck veniremember, 'the State H presented an *articulable, nonrace related* reason." Importantly, the Georgia Supreme Court merely affirmed the trial court's findings, which did not include findings as to the plausibility of the prosecutor's proffered reasons.

determine whether its implicit findings are reasonable. As I explain below, the record fails to support a finding that the prosecutor's reasons were credible.

The conclusion here is inescapable: By rejecting Hightower's *Batson* claim merely because the prosecutor's justifications were "articulable" and "nonrace related," the Georgia courts' adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of," *Batson*.[12] § 2254(d)(1).

II. THE PROFFERED REASONS WERE PRETEXTUAL

Having re-considered my *pre-Miller-El* concurrence, I am now persuaded that had the Georgia courts engaged in all three of *Batson's* steps, they in all likelihood would have found a *Batson* violation.[13] Here, the trial court had before it the number of preemptory strikes used to remove black

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[12] This case is distinguishable from *Atwater v. Crosby*, 451 F.3d 799 (11th Cir. 2006). In *Atwater*, we held that generally a deafendant must present some evidence or argument of comparability at the time that the *Batson*-challenge is made in order to rely upon that argument in habeas proceedings. *Id.* However, in *Atwater*, the trial court "went beyond a mere finding that the state articulated a race neutral reason for the strike." *Id.* 'the trial judge upheld the preemptory strike after agreeing that [the juror] exhibited some difficulty with her responses to the prosecution question." In so doing, 'the third step of the Batson-analysis was touched." *Id.* Here, the judge merely found, for every struck black veniremember, that Briley had given an "articulable" and "nonracea related" justification for the strike-never venturing beyond *Batson's* second step requiring a clearly articulated, race-neutral justification.

[13] "Wisdom too often never comes, and so one ought not to rejecte ti merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting).

veniremembers, the voir dire answers of all the veniremembers, the prosecutor's proffered reasons for striking certain veniremembers, the defendant's representations about the prosecutor's history of discrimination in jury selection, and the prosecutor's response to the accusations.[14]

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[14] The defense attorney made the following statement, among others, in support of Hightower's *Batson* challenge:

> [Of the seven peremptory strikes, Briley] has used six of those strikes to strike blacks Mr. Briley has in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels . . . . He has purposely excluded blacks so that Mr. Hightower will not get a fair and impartial hearing on this case and this matter.

Your Honor, I have here a copy of the *Fulton Daily Reporter* which was on Wednesday, March 30, 1988, where we got headlines, "Does County Plan To Discriminate, high court hears jury panel." This was regarding the case of the *State v. Amadeo* which has gone up to the Georgia Supreme Court. I will make a quote here from the U.S. Supreme Court Justice John Paul Stevens. 'the evidence disclosed is the intentional program of rigging the jury by the prosecutor's office." This arose out of a memo which has been attributed to Mr. Briley stating that there was a purpose and a plan to have a member [sic] number of blacks on the grand jury in Putnam County in order to have it just half the jury criteria for grand jury . . . . You are well acquainted with that case, Your Honor. We would say that this is the same circumstances [sic], the same sort of scheme that Mr. Briley was doing in this particular case. He is purposely using his strikes to provide for just the minimum amount of blacks, absolutely the minimum amount, but what he has done is prevented Mr. Hightower from getting a fair and impartial hearing. Importantly, Briley, although disputing the memorandum's purpose, essentially admitted penning the memorandum when he responded, "Your Honor, insofar as the statements from the Daily Report and the statements from Justice Stevens, . . . I believe Justice O'Conner asked the defense lawyer . . . 'couldn't it have been that Mr. Briley was trying to get the matter improved and was telling them how few they could put on it, in the jury

Because the Georgia courts never assessed Briley's credibility regarding his use of peremptory strikes, we have no factual finding to which to defer, and can look to the record to determine whether it supports the proffered justifications. *See Miller-El*, 125 S.Ct. at 2323, 2326-30 (where the state courts and the Supreme Court looked to the voir dire record to determine whether the proffered reasons were pretextual). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El*, 125 S.Ct. at 2325.[15] The record is replete with examples of veniremembers who were struck arguably because of their race, but three strikes are especially troubling, specifically the exercise of peremptory challenges to eliminate Thelma Butler, Ricky Thomas, and Emerson Davis.

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box.' So, Your Honor, it is a matter of which direction you look at this case . . . ."

[15] The majority states that in order for us to consider Hightower's arguments comparing struck black veniremembers with non-challenged non-black veniremembers, "he must establish cause for his counsel's failure to present the argument [in state court] and resulting prejudice." Majority Op., at 1073. To the extent that the majority holds that any part of Hightower's *Batson* claim procedurally defaulted, I disagree. No Georgia court has ever found any part of Hightower's *Batson* claim procedurally barred, nor did the majority mention this as a ground for denying relief in the prior vacated opinion. *See, generally, Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989); *Hightower I*, 365 F.3d 1008 (2004). Furthermore, the comparative juror analysis is further evidence of a *Batson* violation that the trial court *could have* considered at *Batson's* third step, whether counsel made the argument or not. *See, e.g., Miller-El*, 125 S.Ct. at 2325 (where comparative juror analysis was considered).

Briley claims that he struck Thelma Butler because he successfully prosecuted her brother-in-law twelve years prior. He also claims that Butler was somewhat hostile. From the record, it appears that Butler was an ideal juror for a prosecutor seeking the death penalty. Butler felt that people tried for murder are treated too leniently. She was strongly in favor of the death penalty. She felt that mitigating circumstances must be proven before she would consider imposing a life sentence. Her answers alone undermine the veracity of Briley's proffered justification, especially since he never questioned Butler about her brother-in-law. Even more striking is the fact that Briley declined to strike a non-black juror, Michael Hensler, who, himself, had been convicted of and imprisoned for voluntary manslaughter by Briley's office.

In another example, Ricky Thomas's father had been convicted of killing his mother. Because of this conviction and the fact that Thomas had lived with his father after his father's release, the prosecutor struck him speculating that Thomas may possibly identify his father's case with Hightower's. Yet, Thomas indicated that he was in favor of the death penalty, and that he did not even remember the circumstances surrounding his mother's killing because he was too young at the time. The prosecutor never questioned Thomas about his relationship with his father or the potential impact on his ability to decide the case fairly. Again, the pretext is more apparent when viewed in light of the fact that Hensler was not struck.

Emerson Davis was struck because the prosecutor claimed that Davis was somewhat opposed to the death penalty, more so than other veniremembers. Davis never stated that he was opposed to the death penalty, but rather had to hear the case before imposing the penalty. The

prosecutor mischaracterized his voir dire, thereby undermining a claim that the prosecutor's reason was race-neutral. In fact, Davis's views were in line with several non-black jurors[16] whom the prosecutor declined to challenge. If Davis was undesirable as compared to other veniremembers on the question about the death penalty, then the prosecutor would have used his remaining peremptory strikes to eliminate other veniremembers who gave similar answers. However, the non-black venire-members who gave similar answers were not struck.

Viewing the evidence in its totality, including the 'smoking gun" memorandum penned by Briley, it is clear that Briley's proffered justifications were pretextual.

III. THIS CASE IS FACTUALLY ON ALL FOURS WITH MILLER–EL

The factual similarities between *Miller–El* and this case are extensive. In *Miller–El,* the prosecutors struck ten of the eleven qualified black veniremembers with peremptory challenges. 125 S.Ct. at 2325. Here, Briley, used six of seven peremptory strikes to strike black veniremembers.[17] In *Miller–El*, the prosecutor struck a black veniremember because the juror was "inclined" to

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[16] These jurors include Merrick Carter, Rhonda Batchelor, Nellie Stapp, M.P. Ervin, Miriam Shatterly, and John Hutcheson.

[17] In *Miller—El,* one black juror was allowed to serve. 125 S.Ct. at 2325. Here, three black jurors served at trial. This difference is unimportant, especially in light of Briley's memorandum. A prosecutor using *any* of its peremptory challenge to eliminate a veniremember because of race runs afoul of the Equal Protection Clause. *See Batson*, 476 U.S. at 98 n. 22, 106 S.Ct. at 1724 n. 22; *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995).

favor rehabilitation, while non-black jurors, who expressed stronger beliefs in favor of rehabilitation, were not struck. 125 S.Ct. at 2327-29. Here, Briley struck Davis, a black veniremember, because he was 'somewhat opposed to the death penalty" as compared to other veniremembers, but did not strike non-black veniremembers, such as Carter, Shatterly, and others mentioned above, who expressed views similar to Davis's, and in some instances expressed views more equivocal than Davis's.

Further, in *Miller–El*, the prosecutor struck from the jury black veniremembers because they had relatives who were prosecuted by the D.A.'s office. 125 S.Ct. at 2328. The Court noted the prosecutor's failure to inquire into the details of the convictions and relationships as further evidence that the reason was a pretext. *Id.* Here, Briley struck four black venire-members because they allegedly had relatives who were prosecuted by the D.A.'s office.[18] Just as in *Miller–El*, Briley did not inquire into the details of these convictions and relationships. Briley also declined to challenge Hensler, a non-black juror who *himself* had been prosecuted and convicted of voluntary manslaughter.

In *Miller–El,* the prosecutor, while stating the race-neutral reasons for the strikes, mischaracterized the voir dire testimony of some of the black venire-members he struck. 125 S.Ct. at 2327. Similarly, Briley mischaracterized the testimony of Davis.

This case is a more factually compelling *Batson* violation than *Miller–El* because of Briley's personal history of past discrimination. The defendant in *Miller–El* demonstrated little, if any, past history of discrimination by

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[18] Briley struck Butler, Thomas, Lucious Boswell, and Mattie Harris.

the specific prosecutors involved in his case, relying mainly on a manual that instructed prosecutors to minimize the number of black jurors. The Supreme Court stated that this evidence confirmed its conclusion that the race-neutral reasons were pretextual. 125 S.Ct. at 2339. Here, Briley himself authored a memorandum that spelled out the scheme to limit the number of blacks in the jury pool. The Hightower's counsel argued that Briley had "in the past shown a bent and scheme to keep down the [ ] number of blacks" serving on jury panels, and claimed that Briley wrote a memorandum detailing a plan to limit the number of blacks on grand juries. Instead of denying involvement with the memorandum, Briley responded to the accusations arguing that the memorandum could be viewed as an effort to improve matters.

Had the trial court delved into *Batson's* third step, this evidence alongside the other evidence would have cast grave doubt on the truthfulness of Briley's proffered reasons.

IV. CONCLUSION

The Georgia courts made no determination as to whether the prosecutor's proffered justifications were pretextual. In finding no *Batson* violation, the state courts relied on the fact that the proffered justifications were "articulable" and "non-race related." This is sufficient for *Batson's* second step, but not the third step which "involves evaluating the persuasiveness of the justification." *Rice*, 126 S.Ct. at 974. We cannot presume that Briley's proffered justifications were truthful because the trial court never made that finding. After reviewing the evidence available to the trial court, I conclude that Briley's reasons were pretextual, and that *Batson* was violated. Accordingly, I would grant Hightower's writ of habeas corpus.

The Supreme Court vacated our prior decision and remanded this case "for further consideration in light of [*Miller–El*]." *Hightower v. Schofield*, — U.S. —, 125 S.Ct. 2929, 2929-30, 162 L.Ed.2d 863 (2005). Reinstating the prior panel opinion violates the Supreme Court's express mandate. Respectfully, I dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15807-P

JOHN WASHINGTON HIGHTOWER,

Petitioner-Appellant,

versus

WILLIAM TERRY,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

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BEFORE: TJOFLAT, ANDERSON and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, John Washington Hightower, is **DENIED.**

ENTERED FOR THE COURT: [September 11, 2006]

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER, Plaintiff, v. TONY TURPIN, Warden, Jackson State Prison, Defendant.	Civil Action No. 3:96-CV-97(DF)

JUDGMENT

Pursuant to the Order of this Court dated and filed August 6, 1999, and for the reasons stated therein, Judgment is hereby entered in favor of Defendant.

This 9th day of August, 1999.

GREGORY J. LEONARD,
CLERK

By: /s/ Zadie Peters
Zadie Peters
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER, Plaintiff, v. TONY TURPIN, Warden, Jackson State Prison, Defendant.	Civil Action No. 3:96-CV-97(DF)

ORDER

Before the Court is Petitioner John Washington Hightower's federal habeas corpus petition pursuant to 28 U.S.C. § 2254. In 1988, Petitioner was convicted by a jury in Morgan County of three counts of murder and sentenced to death on all three counts.

Petitioner is an African-American male in his mid-fifties. In 1983, he married Dorothy Reaves, a divorced woman with two daughters, Evelyn and Sandra, from her previous marriage. He and Dorothy divorced only ten months after they were married but remarried four months later. In April 1987, they divorced a second time but continued to live together.

On Friday, July 10, 1987, Petitioner and Dorothy Hightower argued in the morning before John left for work. The argument ended with Dorothy telling Petitioner that it would be best if he moved out of the house. Petitioner agreed to move out that Sunday.

That afternoon after work, Petitioner stopped at a gun shop and examined a few guns, but he did not buy one. Petitioner asserts that he was deeply distressed and suicidal at the time. He returned on the morning of Saturday, July 11, 1987 and purchased a .25 caliber handgun and ammunition.

Petitioner maintains that he consumed substantial amounts of alcohol and cocaine throughout the day of July 11. He returned home with, the gun that he had purchased and put it under the pillow on the bed he and Dorothy shared. At approximately 3:00 A.M. on Sunday, July 12, Petitioner took the gun from under the pillow and shot and killed Dorothy. He then entered the room of his stepdaughter, Sandra Reaves. She got out of bed but then lay back down, and Petitioner shot her in the head. His other stepdaughter, Evelyn Reaves, attempted to leave the house, but Petitioner caught up with her and shot her three times. He did not harm Kisha Reaves, his niece, who was staying at the house and sleeping next to Dorothy at the time.

Petitioner then got into Dorothy's car and drove around, contemplating suicide, according to Petitioner. The police found and arrested him in Eatonton, Georgia. A handgun, later determined to be the murder weapon, was found in Petitioner's car.

Petitioner was informed of his *Miranda* rights at the scene of his arrest. Several police officers involved in the

arrest and questioning of Petitioner testified that Petitioner did not appear at the time to be intoxicated.

Petitioner was taken to the Putnam County Sheriff's Department, where he was again advised of his *Miranda* rights. His blood-stained clothes were taken to be analyzed. Petitioner indicated that he understood his rights, and he declined to make a statement.

Petitioner was returned to Baldwin County, where he was questioned on July 12, 1998. He was again notified of his *Miranda* rights and signed a waiver of counsel. A member of the Georgia Bureau of Investigation testified that at the time Petitioner did not appear to be under the influence of any intoxicants. Petitioner made two statements to police, confessing to shooting and killing all three victims.

As a result of extensive pretrial publicity, Petitioner's trial was transferred to Morgan County. The trial court originally appointed Alan Thrower to represent Petitioner, but Mr. Thrower immediately requested and received permission to withdraw. The court then appointed Carl Buice and Hulane George, husband and wife as well as law partners, to represent Petitioner. Ms. George had previously represented at least a hundred criminal defendants on felony as well as misdemeanor charges. *Transcript of State Habeas Hearing*, at 111-12. She had conducted approximately fifteen criminal trials, two of which involved murder charges. *Id.* at 130. And, this was not her first death penalty case. *Id.* at 163. Mr. Buice had previously worked on approximately six "significant" felony cases, but he had not previously worked on any murder trials. District Attorney Joseph Briley prosecuted Petitioner.

A jury found Petitioner guilty of three counts of malice murder and sentenced him to death by electrocution

on each count. In sentencing Petitioner to death, the jury relied on the statutory aggravating circumstances that he committed each killing while "engaged in the commission of another capital felony," that is, (1) the murder of Dorothy Hightower was committed while the defendant was engaged in the commission of the murder of Evelyn Reaves, (2) the murder of Sandra Reaves was committed while the defendant was engaged in the commission of the murder of Dorothy Hightower, and (2) the murder of Evelyn Reaves was committed while the defendant was engaged in the murder of Sandra Reaves.

Petitioner's conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court in 1989. *See Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989).[1] Petitioner then sought a writ of habeas corpus from the Superior Court of Butts County, Georgia (hereinafter referred to as "state habeas petition" and "state habeas court"). After conducting a hearing in 1994, the state habeas court denied the petition.[2]

All of the claims made in the instant § 2254 petition were raised in the state habeas proceeding.

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[1] In 1990, the United States Supreme Court denied Petitioner's petition for Writ of Certiorari, *Hightower v. Georgia*, 498 U.S. 882 (1990), and Petitioner's Petition for Rehearing, *Hightower v. Georgia*, 498 U.S. 995 (1990).

[2] The Supreme Court of Georgia denied Petitioner's Certificate of Probable Cause to Appeal the denial of his habeas corpus petition and his Motion for Reconsideration in 1994. The United States Supreme Court denied Petitioner's petition for Writ of Certiorari and Petition for Rehearing in 1995.

I. STANDARD OF REVIEW

As the Court discussed in its previous order of June 2, 1998, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) generally applies to Hightower's petition, because it was filed after the effective date of the Act. *See Neeley v. Nagle*, 138 F.3d 917, 921-22 (11th Cir. 1998). As amended by the AEDPA, 28 US.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's habeas petition and provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In the Eleventh Circuit, a district court evaluating a habeas petition under § 2254(d)(1) must engage in a three step inquiry. First, the court must ascertain the Supreme Court case law that was clearly established at the time the state court made its decision. *Id.* at 923-24. Second, the

court must determine if the state court's decision was contrary to this clearly established Supreme Court case law, "either because the state court failed to apply the proper Supreme Court precedent, or because [it] reached a different conclusion on substantially similar facts." *Id.*[3] Finally, if the federal court finds that the state court's decision was not contrary to clearly established Supreme Court law, it must then determine whether the state court unreasonably applied the Supreme Court authority to the facts of the case at bar. *Id.*

Section 2254(d)(2) determines the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting the habeas petition, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court. § 2254(d)(2). Additionally, factual determinations made by a state court must be presumed to be correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. § 2254(e)(1).

In the June 1998 order, this Court found that certain claims were not adjudicated on the merits within the meaning of § 2254(d) because they were found to be procedurally barred by the state habeas court. This Court is precluded from reviewing claims that the state courts have not previously evaluated, unless Petitioner can demonstrate both "cause for the default and actual prejudice as a result of the alleged violation of federal law," or demonstrate that

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[3] Not only must the clearly established federal law be determined by the Supreme Court, but it must be Supreme Court case law in effect when the state court decided the case. *Neeley*, 138 F.3d at 923 & n.3.

failure to consider the claims will result in a "fundamental miscarriage of justice." *Schulp v. Dew*, 513 U.S. 298, 314-15, 115 S.C. 851, 130 L.Ed.2d 808 (1995); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The cause prong of this test is satisfied by actual ineffective assistance of counsel or by some objective factor external to the defense that impeded counsel's efforts to comply with the state's procedural rule. *Murray*, 477 U.S. at 488, 106 S.Ct. at 2645. While the Supreme Court has not provided a precise definition of the "prejudice" prong of the cause-and-prejudice test, it has made clear that more than a mere possibility of prejudice is required; a petitioner must show that the error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982). *See also Reed v. Ross*, 468 U.S. 1, 12 (1984) (actual prejudice shown where, but for the alleged error, the defendant "might not have been convicted of first degree murder"); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) ("A petitioner shows prejudice due to ineffective assistance of counsel when . . . there is a probability of a different result sufficient to undermine confidence in the outcome [of the case].").

If a petitioner cannot show both cause and prejudice sufficient to excuse a procedural default, his claims may still be reviewed if failure to consider them would result in a "fundamental miscarriage of justice." *Schulp*, 513 U.S. at 314-15. A fundamental miscarriage of justice at the guilt-innocence phase of trial has occurred when a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *Id.* at 323; *Murray*, 477 U.S. at

496. To show that he is "innocent" of the death penalty, a petitioner "must show that 'but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law." *Hill v. Tones*, 81 F.3d 1015, 1023 (11th Cir. 1996) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2522-23, 120 L.Ed.2d 269 (1992)).

II. DISCUSSION

A. Claim I: Petitioner was refused access to a qualified psychiatrist, thereby denying him the ability to prepare and present a defense or to present mitigating psychiatric evidence during the penalty phase of his trial

1. The trial court refused to provide funds for a qualified psychiatric expert

Petitioner contends that the trial court's refusal to provide sufficient funds to enable Petitioner to retain an expert in family violence violated his constitutional rights. At trial, Petitioner made several requests for funds, which he asserted he needed in order to hire a qualified psychiatrist to evaluate him and aid in his defense. In support of these funding requests, defense counsel relied on the Supreme Court case of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which requires that an indigent defendant be given access to a qualified psychiatrist when the defendant demonstrates that his sanity is a significant factor in his defense. *Id.* at 82-83.

During the August 31, 1987 hearing, defense counsel requested that the trial court grant $750 in order to hire someone to perform a psychological evaluation of Petitioner. The trial court granted the requested funds but stated that a

further hearing would be held if the defense requested additional funds. The prosecutor then moved to have Petitioner admitted to Central State Hospital for a psychological examination, but defense counsel objected because they wanted to have Petitioner evaluated by his own psychiatrist.

Defense counsel used the $750 to hire a psychologist, Dr. Archer Moore, in order to conduct an initial evaluation.

Dr. Moore was a friend of Mr. Buice, but he had no background in forensic psychiatry. After evaluating Petitioner, Dr. Moore informed defense counsel that he lacked the substantive expertise necessary to evaluate Petitioner's actions. He advised defense counsel to seek a specialist in family violence, specifically someone with experience in interpreting sudden outbursts of violent behavior.

On February 9, 1988, during a hearing before the trial court, Ms. George informed the court that Dr. Moore had evaluated the defendant and advised counsel that they needed an expert in family violence. *Transcript of 2/9/88 Hearing*, at 2. Ms. George stated that after searching throughout the country, she found a qualified expert, Dr. Manuel Tanay, and that the defense needed him not only in the guilt-innocence phase of trial but also at sentencing to give defense counsel "some clues as to the causes of this tragedy." *Id.* at 3. She estimated that the total expenses for Dr. Tanay would be approximately $6,000. *Id.*

The trial court gave the prosecutor an opportunity to respond. He argued that the court had "already gone further than *Ake*" and that the court had "bent over backwards already in this particular area for this particular defendant." *Id.* at 3-4. The court asked Ms. George how much the

defense had been given so far "to spend at [the defense's] discretion," to which Ms. George responded that they had received a total of $5,750–an initial $750 for an initial evaluation by Dr. Moore (of which they had already spent $450) and $5,000, which they used to hire a special investigator and a jury specialist. *Id.* at 5. The court then, without explanation, declined to allocate any additional funds. *Id.* at 6.[4]

During a hearing on March 9, 1988, Ms. George renewed her request for additional funds with which to hire Dr. Tanay. She informed the court that Dr. Tanay would cost $7,000 and that Petitioner's family could not pay that amount. *Transcript of 319/88 Hearing*, at 1-2. The prosecutor responded that "there has been nothing to indicate that this defendant is psychologically deprived and that he is unable to stand trial at the time, so it must be going to mitigation." *Id.* at 3. The court asked defense counsel to clarify how much money had already been given, and Ms. George responded that the court had given the defense two sums: $5,000 to spend "any way [they] wanted" and $750 for a psychiatric evaluation. *Id.* at 4-5. The parties then went on to argue another matter and nothing further was said about additional funds to hire Dr. Tanay during that hearing.

During a hearing on April 15, 1988, defense counsel read a statement into the record, which essentially outlined several problems that defense counsel believed rendered

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[4] A hearing was held on February 19, 1988, which the petitioner characterizes as "the third *Ake* hearing," but during this hearing Ms. George requested funds with which to conduct an investigation and to hire an expert who could assist defense counsel in conducting voir dire. The defense did not make a specific request for funds to hire a psychiatrist at this hearing.

them unable to provide effective assistance to the defendant. One of the issues mentioned in this statement was the trial court's refusal to grant the defense additional funds to hire Dr. Tanay. *Transcript of 4115/88 Hearing*, at 6. After hearing this statement, the trial court allowed Mr. Briley, for the prosecution, to respond. Mr. Briley stated that "there has been absolutely no indication on defense counsel's part that they intend to use insanity, a special plea of insanity, not guilty by reason of insanity or any of the other accepted defenses in this case which would even trigger the necessity of the court appointing psychiatrists or rendering money to the defense for a psychiatric review in this case." *Id.* at 9. Immediately after Mr. Briley finished his response, the trial judge stated that he was going to adhere to all of his former rulings on the matter. *Id.* at 10.

On direct appeal, the Georgia Supreme Court found that the trial court did not deny Petitioner any necessary financial assistance. *Hightower*, 386 S.E.2d at 511 (citing *Crawford v. State*, 257 Ga. 681, 362 S.E.2d 201 (1987)).[5] The Georgia Supreme Court found that the trial court authorized payment of $750 for a psychiatric evaluation and $5,000 for a special investigator "or other such expert assistance as the defendant might choose." *Hightower*, 386 S.E.2d at 511. The Georgia Supreme Court therefore concluded that "the trial court did not deny the defendant any necessary financial assistance." *Hightower*, 386 S.E.2d at 511.

The aforementioned AEDPA standard governs the Court's consideration of the instant claim, because the claim has been adjudicated on the merits in state court. Under that

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[5] The state habeas court found that it was bound by the decision of the Georgia Supreme Court. *State Habeas Order, at* 65.

standard, Petitioner must show that the Georgia Supreme Court's decision regarding the trial court's denial of Petitioner's funding requests was contrary to or involved an unreasonable application of clearly established Supreme Court case law. *Id.* § 2254(d)(1). Petitioner argues in the instant petition that the trial court's refusal to provide additional funds with which to hire an expert in family violence violated his rights to due process, a fair trial, and the effective assistance of counsel. Petitioner asserts that because his mental state at the time of the killings was the crux of his defense, his counsel needed an accurate evaluation by a qualified psychiatrist to assist them in his defense. Because the trial court refused to grant Petitioner's request for additional funds to retain such an expert, counsel had to rely on Dr. Moore, who was not qualified to render an effective evaluation of Petitioner.[6]

In *Ake*, the Supreme Court held that an indigent defendant who knows that his sanity at the time of the offense will be a significant factor at trial must have access to a competent psychiatrist, thus enabling him to present an effective defense. 470 U.S. at 83, 105 S.Ct. at 1097. The Court stated, however, that,

> **[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his**

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[6] During cross examination by Mr. Briley, Dr. Moore had to admit that he could not accurately diagnose a personality disorder, could not differentiate Petitioner from other criminals, could not rule out "revenge" as a motivating factor for the killings, had no explanation for Petitioner's failure to commit suicide after the killings, had no opinion whether Petitioner was able to consider the legal consequences of his actions at the time of the killings, and could not explain why Petitioner responded with violence to "the stressful situation" on the morning of July 12, 1987.

> **personal liking or to receive funds to hire his own.** Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the state the decision on how to implement this right.

Id. (emphasis added). Before this right is triggered, the defendant must show "a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987).

The Court finds that the decision of the Supreme Court of Georgia was not contrary to or an unreasonable application of Ake v. Oklahoma or any other Supreme Court case. 28 U.S.C. § 2254(d). The trial court allocated $5,750 to the defense and did not limit expenditure of those funds but rather allowed counsel to spend the funds "any way [they) wanted." *Transcript of 319/88 Hearing*, at 4-5; *Transcript of Habeas Hearing*, Volume I, at 125-26. Even though Ake clearly states that a criminal defendant does not have a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own, 470 U.S. at 83, 105 S.Ct. at 1097, Petitioner was given some funds with which to hire a psychologist of his choice (Dr. Moore); moreover, Petitioner objected to being evaluated at Central State Hospital.

Petitioner has not shown that additional funds with which to hire a specialist was required under Ake or that the failure of the trial court to grant any additional funds denied Petitioner a fundamentally fair trial. *Moore*, 809 F.2d at 712. As such, Petitioner is not entitled to habeas relief on this ground.

2. The prosecution improperly attended every "ex parte" pretrial hearing concerning Petitioner's need for a qualified psychiatrist

Petitioner also asserts that his constitutional rights were violated when the prosecution improperly attended every pretrial hearing concerning Petitioner's need for a qualified psychiatrist and successfully opposed Petitioner's request for funds. Petitioner contends that *Ake* requires that hearings on requests for psychiatric assistance be held *ex parte*. Petitioner asserts that his constitutional rights were violated when the trial court not only allowed the prosecution to be present during each of the five hearings held in Petitioner's case but also by allowing the prosecutor to actively oppose Petitioner's requests for additional funds to retain a qualified psychiatrist.[7] Petitioner relies on the following statement in *Ake* to support his assertion: "When the defendant is able to make out an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance

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[7] Petitioner contends that the prosecutor's presence during these hearings had two detrimental effects on his defense. First, the prosecutor was able to urge the court to deny Petitioner's requests for additional funds to hire an expert in family violence. After hearing the prosecutor's arguments against granting Petitioner additional funds, the trial court denied Petitioner's request for funds each and every time. Second, the prosecutor gained knowledge of the defense strategies, as they were required to be presented to the court during the hearings, and the prosecutor used this knowledge against the defense. For example, the prosecutor learned that Dr. Moore did not have the necessary expertise to shed light on why Petitioner might have committed the killings, and, the prosecutor used this knowledge when he cross-examined Dr. Moore. *See* n.6, *supra*. Moreover, the defense was forced to reveal its "family violence" defense in front of the prosecutor as well as details about the manner in which the defense had spent its allocated funds.

of a psychiatrist is readily apparent." *Ake*, 470 U.S. at 82-83; 105 S.Ct. at 1096.

Over the Petitioner's objections to the prosecution's attendance, the trial court ruled that "ex parte," as used in *Ake*, did not exclude the prosecutor's presence at the hearing, but rather, it simply excluded his participation. *Transcript of 8/31/87 Hearing*, at 15-16. On direct appeal, the Georgia Supreme Court held that, "[t]he defendant has not shown any harm from the denial of an ex parte hearing on the funds issue." *Hightower v. State*, 386 S.E.2d 509, 511 (Ga. 1989)[8] Because them is a state court decision on the merits with respect to this particular claim, the new AEDPA standard discussed previously controls consideration of this claim.

In *Ake*, the Supreme Court did make a reference to an ex pane hearing, but the Court did not hold that such a hearing is constitutionally required. The Court held in *Ake* that, if a defendant makes an ex parte showing that the question of his sanity is likely to play a significant role in the trial, then he is entitled to the assistance of a competent psychiatrist. 470 U.S. at 82-83, 105 S.Ct. at 1095-96. *Ake* did not hold that a defendant has the right to an ex parte competency hearing. Therefore, the state court's decision was not contrary to nor involved an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1). Accordingly, Petitioner is not entitled to have his § 2254 petition granted on this ground.

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[8] The state habeas corpus court did not address the Petitioner's claim that the trial court's failure to conduct his *Ake* hearing ex parte violated his constitutional rights.

B. Claim II: The trial court failed to strike for cause several jurors whose strongly stated views in favor of the death penalty substantially impaired their ability to consider a lesser sentence

Petitioner next argues that the trial court failed to strike for cause several prospective jurors, two of which ended up on Petitioner's jury, who stated strong views in favor of the death penalty, and that such failure violated Petitioner's Sixth and Fourteenth Amendment rights to an impartial jury.

In *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), the Supreme Court clarified its previous decision in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968),[9] by setting forth "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." The Court held that the proper standard is whether the prospective juror's views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). The Court further held that "in addition to dispensing with Witherspoon's reference to 'automatic' decision making, this standard likewise does not require that

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[9] The Witherspoon Court concluded that potential jurors can be subject to challenge for cause based on their views only if it is unquestionably apparent that they would automatically vote against the death penalty or that their views would prevent them from making an unbiased determination on the question of guilt.

a juror's bias be proved with 'unmistakable clarity.'" *Wainwright*, 469 U.S. at 424.

A federal court reviewing a defendant's habeas petition must give deference to the trial judge's determination of death-penalty bias, because the trial judge sees and hears the jurors and, "despite the lack of clarity in the printed record, ... there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.*, at 425-26, 105 S.Ct. at 852-53. Furthermore, determining whether a prospective juror is biased depends upon credibility and demeanor, which are "peculiarly within a trial court's province." *Id.*, 469 U.S. at 428, 105 S.Ct. at 854. And, these determinations cannot be easily discerned from the written record. *Id.*, 469 U.S. at 429, 105 S.Ct. at 855.

Additionally, a trial judge's finding that a particular prospective juror was not biased is a finding of fact. *Wainwright*, 469 U.S. at 429, 105 S.Ct. at 855. This Court must review the state trial judge's findings on factual issues with a presumption of correctness. 28 U.S.C. § 2254(d); *Wainwright*, 469 U.S. at 429, 105 S.Ct. at 854.

During voir dire at Petitioner's trial, at least two prospective jurors, who were ultimately empaneled on Petitioner's jury, displayed an inclination toward the death penalty: Rufus Little and Paul Jensen. The following exchange took place between defense counsel and Mr. Little during voir dire:

> Ms. George: All right. How about you, Mr.Little? Would you automatically vote for the death penalty if there was a conviction of three people?

> Mr. Little: If they proved without a doubt he did it.
>
> Ms. George: You would automatically do it?
>
> Mr. Little: If they proved without a doubt, based on the circumstances, I would. But it's hard to say until I hear the whole case.
>
> Ms. George: But you did say if the person was convicted beyond a reasonable doubt, you would automatically vote for the death penalty?
>
> Mr. Little: Automatically–like I say I would automatically–like I say I would have to hear the case. Like I say I would automatically vote for the . . . .

Trial Transcript, at 392-93 (hereafter "T."). Mr. Little's response was interrupted by Ms. George saying, "That's all I have, your honor." *Id.* at 393. After conducting this segment of voir dire, Ms. George moved to have several jurors removed from the panel for cause, but Mr. Little was not one of them. Furthermore, the defense did not use a peremptory strike to remove Mr. Little from the panel.

The following exchange took place between defense counsel and Mr. Jensen during voir dire:

> Mr. Buice: Mr. Jensen? Where are you on that?[10] Would the fact that three people died . . .
>
> Mr. Jensen: He's convicted of three murders?
> Mr. Buice: Yes.
>
> Mr. Jensen: It would be very—it would determine—it would have to determine the case—the case would have to determine how I'd feel exactly, but it would be very hard for me not to vote for the death penalty because of three murders.
>
> Mr. Buice: Well, would the fact of three murders, then tend to close your mind to other considerations?
>
> Mr. Jensen: Right now it would, but it would have to be determined by the severity of the case and what was involved in determining of the three murders [sic].

T. 112-13. Defense counsel moved to strike Mr. Jensen for cause based on two things. First, Mr. Jensen was a college student at the time, and he stated that if he had to spend a week in trial, he was afraid that he could fail a class. T. 122. Defense counsel argued that "because [Mr. Jensen] feels uncomfortable about being here and he is afraid as he stated that he would fail, that would cause a burden on him to take the time that would be necessary to make a fair and impartial

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[10] This question refers to defense counsel's previous question: "Would the fact that three people were killed in this prevent you from giving consideration to other factors in the case and giving consideration to the life sentences as appropriate punishment?" T. 110.

judgment in this case." *Id.* Second, defense counsel argued that Mr. Jensen was "equivocal as to the death penalty [and] whether or not he would [give] a life sentence if drugs or alcohol were involved." *Id.* at 126. The prosecution responded that "the fact that counsel argued that [Mr. Jensen's] answers were equivocal fails to disqualify him." *Id.* at 127. The trial court then denied the defense's motion to strike Mr. Jensen for cause, and the defense did not peremptorily strike him. *Id.*

On direct appeal, Petitioner argued that the trial court erred by failing to excuse these two jurors for cause under Witherspoon. The Georgia Supreme Court found that the trial court's failure to excuse these jurors was "within the deference due the trial judge's determination." *Hightower*, 386 -S.E.2d at 512 (citations omitted).

In his state court habeas petition, Petitioner's argument was slightly different than his argument on direct appeal. He argued to the state habeas court that the trial court utilized the wrong standard when it failed to strike these prospective jurors for cause. Petitioner asserted that the trial court utilized the "automatic" standard from *Witherspoon*, which was discarded in favor of the "substantial impairment standard" in *Wainwright*. The state habeas court did not address this argument, however.

Petitioner makes the same argument in the instant habeas petition as he made in his state habeas petition. Respondent argues that this claim is procedurally barred, because Petitioner did not raise this specific argument at trial or on direct appeal. Although the state habeas court did not address this argument, it would have found the argument to be procedurally defaulted since Petitioner had not raised it previously either at trial or on direct appeal. *See* O.C.G.A. § 9-14-51. As such, this Court cannot consider the claim

unless it finds that Petitioner has demonstrated "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Schuip*, 513 U.S. at 314-15; *Murray*, 477 U.S. 478; *Sykes*, 433 U.S. at 87-88.

Petitioner has not demonstrated cause for failing to raise this argument at trial or on direct appeal. His only allegation in this regard is that his counsel was unaware at trial and on appeal that a new standard for striking death-prone jurors had been set forth in *Wainwright*.

In *Murray v. Carrier*, the Supreme Court considered the extent to which a counsel's failure to raise a claim constitutes cause for procedural default where such failure results from ignorance of the correct legal standard rather than a deliberate, tactical decision. 477 U.S. at 486, 106 S.Ct. at 2644. The Court held that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Id.* Here, Petitioner's procedural default stems from his counsel's ignorance of the correct legal standard. Under Murray, the reason for this failure to raise the claim at trial and on appeal does not constitute cause excusing the default. *Id.*

Even if Petitioner were able to demonstrate cause for his default, he is unable to show prejudice resulting therefrom. Petitioner has not shown that the trial court's failure to strike Mr. Jensen and Mr. Little for cause violated his constitutional rights. Mr. Little at first responded that he would impose the death penalty if the defendant were convicted of three murders, but he later clarified that "it's hard to say" whether he would automatically impose the death penalty under the circumstances presented until he

heard the whole case. T. 392-93. His later response indicates an ability to be impartial. Ms. George interrupted him before he could elaborate on his view, but, based on the response he gave, Petitioner has not shown that Mr. Little's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424.

Mr. Jensen stated that his consideration of the sentence would "have to be determined by the severity of the case. . . ." T. 112-13. Mr. Jensen's response does not demonstrate that his views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424.

Therefore, Petitioner has not shown cause and prejudice excusing his procedural default. Furthermore, Petitioner has failed to demonstrate a fundamental miscarriage of justice. Accordingly, Petitioner is not entitled to relief on this ground.

C. Claim RI: The prosecution used peremptory challenges in a racially discriminatory manner

Petitioner contends that the prosecution intentionally excluded African Americans from the jury in his trial in violation of his Sixth, Eighth, and Fourteenth Amendment rights. A prosecutor's racially discriminatory use of a peremptory challenge constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). To establish a prima fade case of a Batson violation, a defendant must show that (1) he is a member of a cognizable racial group, (2) the prosecutor removed a member of that racial group, and (3) the totality

of the circumstances raises an inference that the prosecutor used the challenge to exclude the juror because of race. *Id.* at 97. Once the defendant makes such a prima facie showing, the burden shifts to the state to come forward with a race-neutral explanation for the peremptory challenge. *Id.*

During Petitioner's trial, the defense objected that the prosecutor was intentionally excluding African Americans from the jury. The defense pointed to the fact that the prosecutor had used only seven peremptory strikes and that six of those were used against African Americans. The defense also argued that Mr. Briley, the prosecutor, had been shown in the past to have purposefully excluded African Americans from juries. Mr. Briley responded that he had a total of ten peremptory strikes but he used only seven of them, six against African Americans and one against a white prospective juror, and that in the selection of alternate jurors he struck one white and one black veniremember.

The trial court asked Mr. Briley to explain his reasons for striking each of the jurors against whom he exercised his peremptory challenges. With respect to the African Americans whom Mr. Briley struck, Mr. Briley explained that he struck Ricky Thomas because Mr. Thomas's father was convicted of murdering his mother and thus he might identify Petitioner's case with his father's case. T. 619. The prosecutor stated that he struck Lucious Boswell because he had prosecuted. Mr. Boswell's brother-in-law for cocaine trafficking and because Mr. Boswell had stated that someone who killed three people should not get the death penalty but should work it out in prison. T. 620. The prosecutor stated that he struck Mattie Pearl Harris because she had expressed uncertainly about her stance on the death penalty and because her daughter had been convicted of a drug offense. T. 621. The prosecutor

explained that he struck Norman Jonathan Mack because Mr. Mack had contradicted himself on the death penalty by first saying that he was conscientiously opposed to it and then he said he was in favor of it and then he said he was conscientiously opposed to it under some circumstances. T. 621-22. The prosecutor said that he struck Thelma Butler because she was the sister of the wife of someone whom the prosecutor had previously prosecuted. T. 621. The prosecutor stated that he struck Emerson Davis, Jr. because Mr. Davis was somewhat opposed to the death penalty. T. 624. Finally, the prosecutor explained that he struck Lynette Davis because he had just convicted Ms. Davis's uncle of burglary and because she stated that she was against the death penalty but felt that she could impose it under certain circumstances. T. 625.

After hearing Mr. Briley's explanations, the trial court held that the defense had failed lo establish a prima facie case of discrimination on the part of the prosecutor and that the prosecutor had articulated a non race-related reason for striking each African American juror. T. 626. Thus, the trial court overruled the defense's Batson objection . *Id.*

On direct appeal, the Supreme Court of Georgia held that the trial court's determination that the prosecution had articulated legitimate, non-racial reasons for his peremptory challenges was not clearly erroneous. *Hightower v. State*, 386 S.E.2d at 512. The court noted that the prosecutor's reasons for striking these jurors was [sic] because four of them were closely related to persons convicted of serious felonies, and the other two stated conscientious opposition to the death penalty. *Id.* The court further noted that at least two African-American prospective jurors were struck by the defendant after having been accepted by the prosecutor. *Id.*

The state habeas court found that Petitioner's Fourteenth Amendment claim was precluded from review because it was decided adversely to Petitioner on direct appeal and that his Sixth and Eighth Amendment claims were procedurally defaulted because those claims were not timely raised at trial and pursued on appeal.

Petitioner has raised the same constitutional claims in the instant petition as he raised in his state habeas petition. With respect to his Sixth and Eighth Amendment claims, this Court finds that they are procedurally defaulted. Petitioner has failed to show cause and prejudice excusing such default or a fundamental miscarriage of justice.

With respect to Petitioner's Fourteenth Amendment claim, because this claim has been adjudicated on the merits in state court, the aforementioned AEDPA standard controls this Court's review of the claim. 28 U.S.C. § 2254(d). Under that standard, Petitioner must show that the Georgia Supreme Court's denial of Petitioner's *Batson* claim was contrary to or involved an unreasonable application of clearly established Supreme Court caselaw. *Id.* § 2254(d)(1).

Petitioner has easily satisfied the first two prongs of his prima facie burden under *Batson*; the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily struck certain jurors because of their race. The trial court, having the best opportunity to view the prosecutor's demeanor and determine his credibility, found the prosecutor's explanations to be credible. The trial court also found there to be a race-neutral basis for all of the prosecutor's peremptory challenges of black prospective jurors. The Georgia Supreme Court affirmed the trial court's evaluation. This Court cannot say that the Georgia Supreme Court's determination was unreasonable or contrary to *Batson* or any

other Supreme Court case within the meaning of the AEDPA. Accordingly, Petitioner is not entitled to relief on this basis.

D. Claim IV: Prosecutorial Misconduct

Petitioner contends that Mr. Briley engaged in repeated instances of prosecutorial misconduct, which deprived Petitioner of a fair trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner's first claim in this regard is that the prosecutor improperly induced the trial court to remove key language from a jury charge instructing that if the defendant were found to be guilty but mentally ill, he would not be released. Specifically, O.C.G.A. § 17-7-131(bX3)(B) provides that,

> [i] all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following: . . (B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.

O.C.G.A. § 17-7-131(b)(3).

In the case at bar, after the close of evidence, the trial judge conducted a conference, during which he and the attorneys discussed the jury charges. The prosecution and defense agreed that a charge regarding guilty but mentally ill should be given; however, Mr. Briley objected to the wording of the statutory language, because he asserted that it did not contemplate the death penalty. He argued that the

statutory wording implied that the defendant would be turned over to the state for imprisonment and that this would not be accurate in the death penalty context. T. 986-88. Mr. Briley suggested that the judge change the wording to state that if found guilty but mentally ill the defendant would be treated "according to law." *Id.* The judge responded that the best thing to do would be to say nothing at all about the disposition of the defendant. T. 988. Mr. Briley agreed to this approach, and defense counsel did not object. *Id.* So, the charge that the court ultimately gave to the jury did not contain the language from the statute regarding the defendant being given over to the Department of Corrections or Department of Human Resources. Additionally, Mr. Briley stated the following in his closing argument:

> Now, lathes and gentlemen, if we're going to say that a fellow who snorts a little cocaine and a fellow who drinks a little bit of beer and a man who's allowed himself to become so selfish that he can't stand for anybody to thwart his wishes, if we're going to find that his crime was a result of mental illness, we're turning him loose on us. That's all there is to it.

T. 1031.

Petitioner argues that the aforementioned statement in the prosecutor's closing argument coupled with the trial court's omission of the subject statutory language impermissibly gave the jury the impression that Petitioner would have been released if the jury rendered a verdict of guilty but mentally ill.

The Georgia Supreme Court has recognized that the purpose of O.C.G.A. § 17-7-131(b)(3)(B) is to notify the jury

that the defendant will not merely be released if found to be guilty but mentally ill. *Spraggins v. State*, 258 32, 34, 364 S.E.2d 861, 863 (1988). In Spraggins, the trial court omitted this statutory language in its jury charge concerning the defense of guilty but mentally ill. *Id.* Additionally, during closing arguments of the guilt/innocence phase of trial, the prosecutor made the following statement:

> Folks, he's either guilty or he's not. You need to excuse him or you don't. If you want to excuse him, that's your decision. . . . So, if you think he's guilty, but you don't want to punish him, or if you want to say to [the victim], "We don't care what happened to you, and we don't care what you went through," you just find him guilty but mentally retarded, then tell all the other mentally [sic] people "Don't worry about it . . . you can do anything. . . ."

Id. 258 Ga. at 34, 364 S.E.2d at 863. On appeal, the Supreme Court of Georgia reversed the defendant's conviction, because, in light of the prosecutor's strong implication in his closing argument that a verdict of guilty but mentally ill would result in the defendant's release, the court could not say that "the jury's decision to find the defendant guilty instead of guilty but mentally ill was not contributed to by the court's omission to charge on the consequences of the latter verdict." *Id.*

In the case at bar, the state habeas court found that this claim had been procedurally defaulted; thus, in order for this Court to consider the merits of the claim, Petitioner must show cause and prejudice to excuse the default or a fundamental miscarriage of justice.

The Court assumes for present purposes that the trial court's failure to give the subject statutory jury instruction was erroneous. *See Frady*, 456 U.S. 152, 102 S.Ct. 1584 (in

determining whether petitioner had established actual prejudice from counsel's failure to object to instruction given by trial court, the Supreme Court proceeded on the assumption that the instruction was in error). Nevertheless, the Court finds that Petitioner has not established actual prejudice resulting from his trial counsel's failure to object to the trial court's refusal to give the subject statutory charge. At most, Petitioner has shown that this alleged error created a possibility of prejudice; however, a mere possibility of prejudice is not sufficient. *Id.* 456 U.S. at 170, 102 S.Ct. at 1596. The evidence supporting Petitioner's guilty verdict is overwhelming, whereas there is little evidence supporting a verdict of guilty but mentally ill.[11] Petitioner has not shown that but for this alleged error, he might not have been found guilty of murder. *Reed*, 468 U.S. at 12.

Since Petitioner has not demonstrated prejudice, the Court need not reach the issue of cause. See Francois v. Wainwright, 741 P.2d 1275, 1283 (11th Cir. 1984) ("We need not examine the cause requirement here, because we are satisfied that Francois suffered no actual prejudice arising from the waiver of the claim.").

Additionally, Petitioner is unable to show a fundamental miscarriage of justice in this regard, because he cannot show that the alleged error has probably resulted in the conviction of someone who is actually innocent. *Schulp*, 513 U.S. at 314-15. As stated above, the evidence against Petitioner is overwhelming. In fact, there is no real question

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[11] During the state habeas hearing, Ms. George admitted that she and Mr. Buice did not pursue a guilty but mentally ill defense before the charge conference, because they lust didn't feel like [they] could prove that . . . after looking at the evaluation of the psychiatrist." *Transcript of State Habeas Hearing*, at 169.

that Petitioner committed the subject killings. *See e.g., Transcript of State Habeas Hearing*, Volume I, at 127-28; 177-78.

Because Petitioner has failed to establish cause and prejudice excusing his default or a fundamental miscarriage of justice, the Court is precluded from reaching the merits of Petitioner's claim regarding prosecutorial misconduct. Accordingly, Petitioner is not entitled to habeas relief with respect to this claim.

Petitioner also asserts that the prosecutor engaged in the following other instances of improper conduct: (a) arguing improperly against funds for a competent psychiatrist; (b) arguing for the inclusion of unconstitutionally death-prone jurors; (c) exercising peremptory strikes in a racially discriminatory manner; (d) improperly injecting his personal opinions throughout the trial; (e) relying upon improper objections, comments, and questions to interject his personal opinion of certain witness' veracity; (f) improperly making a racially charged remark to inflame the jury; (g) repeatedly making improper insinuations and suggestions to mislead the jury; (h) resorting to unsupported allegations against Petitioner during cross examination; (i) engaging in improper and prejudicial speeches to the jury; (j) repeatedly misrepresenting the law with respect to such issues as the standard for excluding jurors because of their views of capital punishment and the standard for a sentence of death, mitigating circumstances, and parole; and finally, (i) improperly using victim-impact evidence.

The state habeas court found that any claims of prosecutorial misconduct based on the prosecutor's arguments and alleged prejudicial statements at both phases of Petitioner's trial were procedurally defaulted. *State*

Habeas Order, at 66. The state habeas court found that the defense counsel made a tactical decision not to object to the prosecutor's statements. *Id.* at 66. Thus, Petitioner failed to show cause for the default. *Id.* Furthermore, the state habeas court did not find any actual prejudice, because the remarks were not so egregious as to deny Petitioner a fair trial. *Id.* at 66-67.

After reviewing Petitioner's claims and arguments in support thereof, although the Court finds that the prosecutor, as we [sic] was wont to do, engaged in unprofessional conduct throughout the trial, Petitioner has not made the requisite showing of cause and prejudice to excuse his procedural default or a fundamental miscarriage of justice."[12] Accordingly, Petitioner is not entitled to habeas relief on these grounds.

E. Claim V: The trial court failed to transcribe all of the proceedings against Petitioner

Petitioner argues that several critical conferences between counsel and the trial court were never transcribed, including (1) the bench conference held during the sentencing deliberations relating to a note sent by the jury asking whether life sentences would run consecutively or concurrently, (2) the hearing regarding the defense's motion for funds to conduct voir dire held on February 19, 1988, (3) the statement by the trial judge to defense counsel to the effect that he would not pay the defense counsel for any new

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[12] To the extent that any of the claims presented in the instant habeas petition were not included in the state habeas petition, those claims have not been exhausted. Accordingly, this Court shall treat them as procedurally defaulted, because the Georgia courts would treat them as such under O.C.G.A. § 9-14-51.

motions they filed, and (4) the statement by the trial judge at the start of the suppression hearing that the defense had the burden of proof. Petitioner maintains that the failure to transcribe these events violated Petitioner's Fifth and Fourteenth Amendment Rights.

In Petitioner's state habeas corpus petition, he alleged that his trial counsel were ineffective for failing to assure that all proceedings were transcribed.[13] To the extent that Petitioner's instant claims are separate from the aforementioned claim raised in his state habeas petition, these claims have not been exhausted. Accordingly, this Court shall treat them as procedurally defaulted, because the Georgia courts would treat them as such under O.C.G.A. § 9.

After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice excusing the default or fundamental miscarriage of justice. Petitioner has demonstrated the importance of capturing the entire proceedings on record, but he has not shown that his Fifth or Fourteenth Amendment rights were violated by the fact that some of the conferences held in his case were not transcribed. As such, Petitioner is not entitled to habeas relief on this ground.

F. Claim VI: The state obtained Petitioner's confession unconstitutionally and improperly used it against him at trial

Petitioner asserts that the state obtained his confession unconstitutionally and improperly used it against him at trial in violation of his Fifth, Sixth, Eighth, and

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[13] The state habeas court did not address this claim, however.

Fourteenth Amendment rights. Petitioner makes three specific allegations in this regard. First, he contends that the state failed to honor his right to remain silent despite his repeated assertions that he had "nothing to say." Petitioner raised this claim in his state habeas petition. The state habeas court noted that, while he had alleged on direct appeal that the trial court erred in denying his motion to suppress because he requested counsel during the interrogation, "at no time did Petitioner claim that he had allegedly exercised his right to remain silent and that his request was not honored." *State Habeas Order*, at 6. As such, the state habeas court found that Petitioner's claim was procedurally defaulted and that he failed to establish cause and prejudice to excuse the default. *Id.* at 7.

Second, Petitioner maintains that the state deliberately elicited a statement from him at a critical stage in the proceeding. Petitioner raised this claim in his state habeas petition. The state habeas court noted that, while Petitioner had argued on direct appeal that his Fifth Amendment rights were violated when his request for counsel was not honored during interrogation, "Petitioner did not make any assertion on appeal that the interrogation became a 'critical stage' for purposes of the Sixth Amendment right to counsel attaching." *Id.* at 15. As such, the state habeas court found Petitioner's claim to be procedurally defaulted and that Petitioner failed to establish cause and prejudice to excuse the default.

Finally, Petitioner asserts that the state unlawfully discouraged him from exercising his right to counsel. This claim was also found to be procedurally defaulted by the state habeas court. *Id.* at 6-7.

This Court is barred from considering these procedurally defaulted claims absent a showing of cause for

the default and resulting prejudice or a fundamental miscarriage of justice. After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice or fundamental miscarriage of justice. Petitioner was repeatedly advised of his right to remain silent and his right to an attorney during questioning. The record contains no evidence that Petitioner was coerced into confessing to the subject killings. The trial court found that Petitioner's confession was voluntary, and the Georgia Supreme Court affirmed that finding on direct appeal. Accordingly, Petitioner is not entitled to habeas relief on these grounds.

G. Claim VII: The penalty phase instructions of the trial court were misleading and incomplete

Petitioner asserts that the jury's instructions during the penalty phase were misleading and incomplete in violation of his Eighth and Fourteenth Amendment rights for two reasons. First, the trial court failed to instruct the jury that it could consider Petitioner's history of alcoholism and drug use as a mitigating factor. Second, Mr. Briley asserted that voluntary alcohol use could never be a mitigating circumstance. T. 1417.

Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner's claim was procedurally defaulted due to his failure to timely raise it at trial and on direct appeal and that Petitioner could not establish cause and prejudice to excuse the default.

After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. The jury was not precluded from considering Petitioner's history of

alcoholism and drug use as a mitigating factor. As such, Petitioner is not entitled to have his habeas petition granted on these grounds.

H. Claim VIII: The trial court impermissibly allowed the prosecutor to introduce inflammatory victim impact evidence

Petitioner argues that the trial court impermissibly allowed the prosecutor to introduce inflammatory victim-impact evidence that so infected the trial as to render it fundamentally unfair under the due process clause of the Fourteenth Amendment. This evidence consisted of a matted 8 x 10 photograph of the victims taken four years before they were killed and an argument by the prosecutor during the sentencing phase that made references to the impact of the victims' deaths.

Petitioner raised in his state habeas petition the claim that Mr. Briley impermissibly referred to the impact of the victims' deaths on their families. The state habeas court found this claim to be procedurally defaulted. It also found that Petitioner had not demonstrated cause for and prejudice from the default, because the prosecutor was permitted to argue about the loss of the victims. *State Habeas Order*, at 69.

This Court finds that Petitioner has failed to make the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. Arguments regarding prosecutorial misconduct do not warrant habeas corpus relief unless the subject prosecutorial conduct was improper and was so prejudicial as to render the entire proceeding "fundamentally unfair." *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir. 1987).

The Court finds no impropriety in the prosecutor's remarks concerning the impact on the victims' families. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991) (holding that such evidence is constitutionally admissible). Even if the prosecutor's remarks were found to be improper, they did not render the entire proceeding fundamentally unfair. Accordingly, Petitioner is not entitled to habeas relief on this ground.

Petitioner did not raise the claim regarding the photograph on direct appeal, so it has not been exhausted. Accordingly, this Court shall treat it as procedurally defaulted, because the Georgia courts would treat it as such under O.C.G.A. § 9-14-51. The Court finds that Petitioner has failed to make the requisite showing of cause and prejudice excusing the default or a fundamental miscarriage of justice. The presentation to the jury of the photograph of the victims was not so prejudicial as to render the proceeding fundamentally unfair. Accordingly, Petitioner is not entitled to habeas relief on this ground.

I. Claim IX: Petitioner was deprived of the effective assistance of counsel

Petitioner asserts that he was deprived of his right to counsel under the Sixth and Fourteenth Amendments when he received ineffective assistance at trial, at sentencing, and on direct appeal. To obtain relief on this claim, Petitioner bears the burden of demonstrating that (1) his "counsel's representation fell below an objective standard of reasonableness," and that (2) "a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different." *Huynh v. Washington*, 95 F.3d 1052, 1056 (11th Cir. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "Reasonable probability" is a

probability "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. This Court must review the reasonableness of counsel's performance from counsel's perspective at the time, with every effort "to eliminate the distorting effects of hindsight." *Id.*

1. Ignorance of the law

a. Failure to Raise Issues

Petitioner argues that his trial counsel were ineffective for failing to raise numerous key issues at trial and on appeal. First, he claims that his counsel failed to properly object to and argue the state's introduction of improper and prejudicial aggravating evidence at the sentencing phase. Petitioner raised this claim in his state habeas petition, but the state habeas court found that this claim lacked merit. *State Habeas Order*, at 49.

This Court finds that counsel's failure to object to this evidence was not so unreasonable as to be ineffective under Strickland. As discussed previously (see section H, *supra*), Petitioner has failed to show that the introduction of such evidence was improper. Thus, Petitioner has not demonstrated a reasonable probability that the result of the proceeding would have been different absent counsel's alleged errors. As such, this claim is without merit.

Second, Petitioner argues that his counsel were ineffective for failing to object to the trial court's refusal to give a portion of the jury instruction regarding the "guilty but mentally ill" doctrine. As discussed previously (see section D, *supra*), Petitioner is unable to demonstrate prejudice resulting from counsel's failure to object to the trial court's refusal to give the statutory jury charge.

Therefore, Petitioner cannot show a reasonable probability that but for counsel's conduct the result of the proceedings would have been different. As such, Petitioner has not demonstrated ineffectiveness under Strickland with respect to this claim.

Third, Petitioner asserts that his counsel were ineffective for not demanding that the trial court charge the jury that they were not to consider the possibility of parole even though the issue was discussed during voir dire and the jury submitted the following question during their sentencing deliberations: "Would life sentences on each count run consecutively or concurrently?" T. 1468. Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner had failed to show prejudice resulting from counsel's failure, because under the circumstances the trial court was not required to give a jury instruction about the possibility of parole. *State Habeas Order*, at 40.

This Court finds that Petitioner has failed to show that his counsel's actions were unreasonable or a reasonable probability that but for those actions the result of the proceedings would have been different. Under Georgia law, a jury may not consider a defendant's parole eligibility in the sentencing phase of death penalty case. *Quick v. State*, 256 Ga. 780, 787, 353 S.E.2d 497, 503 (1987). A trial court is required to instruct the jury that the issue of parole is not proper for their consideration only if the jury asks to be instructed about the possibility of parole. *Id.* Here, the jury did not ask to be instructed about parole; rather, their question concerned whether Petitioner's sentence for each count would run consecutively or concurrently. In light of the nature of their inquiry, the trial court was not required under *Quick* to specifically instruct the jury not to consider parole. As such, counsel's failure to demand such an

instruction is not tantamount to ineffectiveness under *Strickland.*

Fourth, Petitioner claims that counsel were ineffective for not demanding that the trial court charge the jury not to consider whether life sentences would run consecutively or concurrently after they submitted the aforementioned question during their sentencing deliberations. Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner had failed to show prejudice resulting from counsel's failure, because the trial court told the jury that the issue of whether life sentences on each count would run consecutively or concurrently was "a matter within the court's discretion and not something that [it] could answer at this time,"[14] and this response was permissible under state law. *State Habeas Order*, at 42.

This Court finds that Petitioner has not shown that his counsel's conduct was unreasonable or any prejudice as a result of that conduct. *Lee v. State*, 258 Ga. 762, 763, 374 S.E.2d 199, 201 (1988) (trial court did not err in instructing the jury not to consider whether defendant would be given consecutive or concurrent life sentences) (citing *Quick v. State*). The trial court's statement to the jury was sufficient to notify them that they were not to consider the issue. Therefore, Petitioner cannot show that the result might have been different had counsel demanded an instruction in this regard. Accordingly, Petitioner has failed to demonstrate ineffective assistance of counsel.

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[14] T. 1468-69

b. Failure to Secure Proper Burden of Proof

Petitioner contends that counsel were ineffective in failing to demand that the burden of proof be placed on the state with respect to the voluntariness of his statement to police. Consequently, counsel questioned the police officers on direct examination, while the prosecutor was permitted to ask the officers leading questions on cross examination.

Petitioner raised this claim in his state habeas petition. The state habeas court found that this contention lacked a factual basis, because the trial court did not place the burden of proof on Petitioner as he had claimed. *State Habeas Order*, at 42. Thus, the state habeas court held that Petitioner had failed to show attorney error or prejudice in this regard. *Id.* at 47.

This Court likewise finds that Petitioner has failed to demonstrate ineffective assistance of counsel with respect to this claim. Petitioner cannot demonstrate a reasonable probability that the outcome would have been different had his counsel objected to having to question the police officers on direct examination and had the prosecutor been allowed to ask them leading questions. Accordingly, Petitioner has not demonstrated ineffectiveness with respect to this claim.

c. Failure to Secure Proper Standard for Juror Excusal

Petitioner maintains that counsel were ineffective in failing to apply the correct standard regarding excusal of death-prone jurors. Petitioner did not raise this claim in his state habeas petition, and the claim therefore has not been exhausted. As such, this Court shall treat it as procedurally

defaulted, because the Georgia courts would treat it as such under O.C.G.A. § 9-14-51.

The Court finds that Petitioner has not made the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. As discussed previously (see section B, *supra*), counsel's ignorance of the proper standard does not constitute ineffectiveness. *Murray*, 477 US. at 486, 106 S.Ct. at 2644. Furthermore, Petitioner cannot demonstrate a reasonable probability that the result of the proceeding would have been different had defense counsel been aware of and applied the correct standard. Accordingly, this claim is without merit.

2. Failure to-investigate, develop mitigating evidence, and seek correct mitigating instructions at sentencing

Petitioner argues that counsel were ineffective in failing to investigate, failing to develop mitigating evidence, and failing to seek correct mitigating instructions at sentencing. Petitioner makes several specific contentions in this regard. First, Petitioner contends that counsel failed to visit the Georgia Bureau of Investigation or inspect their files prior to trial. Petitioner alleges that he informed his counsel that after viewing the crime scene pictures for the first time at trial, he believed that the clime scene had been altered by the state before the photographs were taken. Because counsel had not seen the pictures before then, they were not able to conduct an effective cross examination on this point. Petitioner raised this claim in his state habeas petition. The state habeas court found that no attorney error or prejudice had been shown, because Petitioner had not presented any evidence of the alteration of the crime scene. *State Habeas Order*, at 50. So, too, here, Petitioner fails to demonstrate that but for counsel's alleged error, the result of the

proceeding would have been different. Accordingly, he has not demonstrated ineffectiveness under Strickland.

Second, Petitioner asserts that counsel never tested Petitioner's clothing for cocaine residue to corroborate his claim that he had used cocaine before the shootings. Petitioner raised this claim in his state habeas petition; the state habeas court found that no attorney error or prejudice had been shown, because Petitioner had been allowed to otherwise present extensive evidence regarding his alleged cocaine use. *Id.* This Court finds that Petitioner has failed to demonstrate that his counsel's failure to test the clothing was unreasonable or that but for this failure the result of the proceedings would have been different. Therefore, this claim is without merit.

Third, Petitioner argues that counsel failed to request a charge regarding the effect of alcohol and cocaine consumption on his ability to knowingly, voluntarily, and willingly give a statement, waive his right to counsel, and waive his right to remain silent Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown, because Petitioner had not shown any authority requiring such an instruction. *Id.* Moreover, the trial court had determined that Petitioner's assertion that he was under the influence of intoxicants when he gave his statement to police was not credible. *Id.* This Court finds that this ineffectiveness claim is without merit.

Fourth, Petitioner contends that counsel failed to develop any legal theory supporting their introduction of evidence of Petitioner's alcohol and cocaine use, and they failed to request an instruction as to the effect of such use in support of any reasonable legal theory, such as lack of specific intent. Petitioner raised this claim in his state habeas

petition, but the state habeas court found that no attorney error or prejudice had been shown, because under Georgia law, such an instruction would have been incorrect. *Id.* at 52. Furthermore, the trial court allowed counsel to argue that the effect of such use was a mitigating circumstance. *State Habeas Order*, at 52. The Court finds that counsel's conduct was not unreasonable and that Petitioner has failed to demonstrate a reasonable probability that but for counsel's actions the result of the proceedings would have been different.

Fifth, Petitioner argues that counsel repeatedly failed to object to the prosecutor's exploitation of Petitioner's alcohol and drug use as an aggravating factor. Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown, because the prosecutor was free to argue all inferences from such evidence since voluntary intoxication is not a defense under Georgia law. *Id.* at 52. This Court finds this claim to be without merit.

3. Failure to choose and support any theory of defense

Petitioner maintains that his counsel were ineffective for failing to choose and support any theory of defense. Petitioner raised this claim in his state habeas petition, but the state habeas court found that this contention lacked merit. *State Habeas Order*, at 57.

In light of defense counsel's testimony at the state habeas hearing regarding their defense tactics, this Court finds that counsel's decision regarding their theory of defense was strategic and reasonable under the circumstances. *Strickland*, 466 U.S. at 681 ("strategic decisions must be respected . . . if they are based on

professional judgment"); *Spaziano v. Singletary*, 36 F.3d 1028 (11th Cir. 1994) ("The Supreme Court has mandated a highly deferential review of counsel's conduct, especially where strategy is involved. Intensive scrutiny and second-guessing of attorney performance are not permitted." (citations omitted)). Petitioner has failed to demonstrate ineffectiveness in this regard.

4. Failure to have key proceedings recorded and transcribed

Petitioner argues that counsel were ineffective for failing to have key proceedings recorded and transcribed. If counsel had ensured that a complete transcript of all proceedings was produced, Petitioner argues that certain determinitive**[sic]** issues could have been identified and raised on appeal. Petitioner did not raise this claim in his state habeas petition, and the claim therefore has not been exhausted. As such, this Court shall treat it as procedurally defaulted, because the Georgia courts would treat it as such under O.C. G.A. § 9-14-1.

This Court is barred from considering procedurally defaulted claims absent a showing of cause for the default and resulting prejudice or a fundamental miscarriage of justice. Petitioner has failed to make the required showing of cause and actual prejudice with regard to these claims, and the Court does not find that failure to review this claim would result in a fundamental miscarriage of justice. Accordingly, this claim cannot form the basis of federal habeas relief.

5. Failure to have a key mitigation witness

Petitioner argues that counsel were ineffective for failing to prepare Reverend Horace Ray, a key mitigation

witness. Petitioner raised this claim in his state habeas petition; the state habeas court found that no attorney error or prejudice had been shown, because such a finding would be based on the benefit of hindsight, which is not a part of the Strickland standard. *State Habeas Order*, at 58. This Court finds that Petitioner has not demonstrated a reasonable probability that but for counsel's failure to adequately prepare this witness, the result of the proceeding would have been different. As such, Petitioner has failed to show ineffective assistance of counsel.

6. Distancing themselves from their client

Petitioner claims that counsel were ineffective for distancing themselves from petitioner in two respects. First, they emphasized the seriousness of the offense and they told the jury that Petitioner was responsible for the killings.[15]

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15 Petitioner points to the following statements made by defense counsel. During voir dire, Mr. Buice stated, 'The issue is not whether Mr. Hightower killed his wife and two stepdaughters, nor is the issue whether he should be punished for that." T. 100. During his opening statement of the guilt/innocence phase of trial, Mr. Buice stated "this is not a case where certain facts are in doubt. There is no question that the crime which was committed here is a serious and grave crime. There is no question that punishment must be meted to the person who did the crime and that punishment will need to be severe." T. 672. He then conceded that petitioner shot and killed his wife and stepdaughters, and he described the event. T. 672-74. During the sentencing phase, counsel stated that "The judge could not direct that initial verdict which you brought back yesterday. Even though under the facts, of the case there was substantially no other verdict to give." T. 1438. Counsel also stated the following: "And, nothing that I can say, nothing that I intend to say intends in any way to justify [Petitioner's] behavior, which has no justification, never, from the beginning." T. 1443. Counsel stated, "I'm constantly, through this whole trial, thinking why am I not arguing a divorce case instead of a capital punishment case, what happened in this whole family that these people just didn't go and get a divorce, like, they all-like they'd done before." T. 1424.

Second, counsel informed the jury that they were appointed to represent Petitioner. Petitioner raised both of these claims in his state habeas petition.

With respect to counsel's seemingly prejudicial comments, counsel testified at the state habeas hearing that their strategy at trial was to save Petitioner's life. *Habeas Transcript* (hereafter "H.T."), at 177; 182. Once the trial court found that Petitioner's confession was admissible, counsel knew that acquittal was "pretty much out of the question." *Id.* So, their goal was to obtain a life sentence for Petitioner rather than the death penalty. *Id.* They wanted to introduce as much as they could about family violence in the guilt/innocence phase of trial, and at sentencing they wanted to show that bad things kept happening to Petitioner and that he lacked what it took to walk away from his situation rather than getting a divorce. H.T. 127, 131-32. Neither attorney consciously distanced himself or herself from Petitioner. H.T. 132; 180. Viewing counsel's comments during trial in the context of their trial strategy, the state habeas court found that Petitioner had not shown any attorney error or prejudice. *State Habeas Order*, at 25.

With respect to Petitioner's argument about his counsel informing the jury that they were appointed, Ms. George testified at the state habeas hearing that she and Mr. Buice decided as a tactical matter to inform the jury that they had been appointed to represent Petitioner. H.T. 159-60. Considering counsel's statement in context, the state habeas court found that counsel did not convey to the jury that they were reluctantly representing Petitioner or that they were required to do so. Rather, they were explaining to the jury that they were Petitioner's advocates. *State Habeas Order*, at 26. Thus, the state habeas court found that no attorney error or prejudice had been shown.

Based on the aforementioned explanations of counsel at the state habeas hearing, the Court finds that Petitioner has failed to demonstrate that his counsel's conduct fell below an objective standard of reasonableness or a reasonable probability that but for counsel's conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689. It is clear that counsel's conduct was based on tactical decisions that were reasonable under the circumstances. *Strickland*, 466 U.S. at 681. Accordingly, Petitioner is not entitled to relief on these grounds.

7. Failure to object to prosecutorial misconduct

Petitioner next asserts that counsel were ineffective in failing to object to many of the prosecutor's instances of misconduct (see section D, *supra*). In his state habeas petition, Petitioner argued that counsel were ineffective in allowing the prosecutor to argue that if Petitioner were found to be mentally ill, he would be "turn[ed] loose." The state habeas court found that Petitioner had isolated a portion of the prosecutor's argument in his assertion of impropriety, and that viewing it in context revealed that the prosecutor was really arguing that voluntary intoxication was not a valid defense.[16] *State Habeas Order*, at 57. In other words, if the jury were to accept Petitioner's defense and acquit him, Petitioner would have been set free. The state habeas court

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[16] The prosecutor argued the following: "Now, ladies and gentlemen, if we're going to say that a fellow who snorts a little cocaine and a fellow who drinks a little bit of beer and a man who's allowed himself to become so selfish that he can't stand for anybody to thwart his wishes, if we're going to justify him for killing somebody. If we're going to find that this crime was a result of mental illness, we're turning him loose on us. That's ail there is to it." T. 1031 (emphasis added).

found that these remarks did not render Petitioner's trial fundamentally unfair. *Id.*

This Court, too, finds that viewed in context, the prosecutor's statements did not render Petitioner's trial unfair. Moreover, Petitioner has failed to demonstrate a reasonable probability that but for defense counsel's failure to object to such statements the results of the proceedings would have been different. Accordingly, Petitioner has not demonstrated ineffectiveness under Strickland.

8. Failure to demand voir dire and disqualification of jurors who had disregarded the court's instructions

Before the jury was charged, the trial judge notified counsel of the following:

> One of the ladies on the jury has told me that one of the other jurors has told her that no matter what anybody said she'd already made up her mind. Did not say which way she'd made up her mind. I, I, you know, have no suggestion as to how we should proceed on that. I frankly don't know how we should proceed.

T. 1461.

The trial judge, defense counsel, and the prosecutor all agreed that there was nothing they could do. *Id.* at 1461-62. Defense counsel did not object or move to excuse the juror and replace her with an alternate. But, the defense did move for a mistrial immediately after the trial court gave the jury a brief supplemental instruction. The trial court denied the motion for mistrial. On direct appeal, the Supreme Court

of Georgia found that there was no abuse of discretion in this regard. *Hightower*, 386 S.E.2d at 513.

In the instant petition, Petitioner argues that counsel were ineffective in failing to demand a voir dire and disqualification of the juror who violated the trial court's instructions. Petitioner raised this claim in his state habeas petition. During the state habeas hearing, Mr. Buice stated that he did not know whether the juror had made up her mind for or against Petitioner. H.T. 183-84. He thought that it would be dangerous to explore the issue and that more harm than good could have resulted. *Id.* at 191. In order to preserve this issue for appeal, however, counsel decided to move for a mistrial. *Id.* Viewing counsel's strategic decision without the benefit of hindsight, the state habeas court found that counsel's actions were not unreasonable. *State Habeas Order*, at 61. Thus, no attorney error or prejudice was shown.

This Court finds that counsel's testimony at the state habeas hearing demonstrates that he made a strategic decision not to challenge the juror's alleged misconduct. Under the circumstances, counsel's tactical decision was not unreasonable. *Strickland*, 466 U.S. at 681. As such, Petitioner has not shown ineffective assistance of counsel.

9. Failure to Use Peremptory Strikes

Petitioner maintains that counsel were ineffective in failing to peremptorily strike certain jurors. First, Petitioner asserts that counsel should have struck jurors Jensen and Sapp, because both stated that evidence of Petitioner's consumption of alcohol and cocaine would adversely affect their ability to find him not guilty of murder.

Petitioner raised this argument in this state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown. *State Habeas Order*, at 62. The court noted the fact that both jurors ultimately said that they would be able to consider rendering a life sentence. *Id.* at 62. And, even though Mr. Jensen said that it would be hard for him not to vote for a death sentence because of three murders, he did state that it would 'have to be determined by the severity of the case and what was involved in determining of [sic] the three murders." *Id.* (quoting T. 113). The state habeas court found that these jurors may have been more favorable to Petitioner than other individuals whom counsel chose to strike and that it would be "sheer speculation" to suppose that the result of the proceedings would have been different if these two jurors had been struck from the panel.

This Court finds that Petitioner has failed to show a reasonable probability that but for counsel's failure to peremptorily strike these jurors, the result of the proceeding would have been different. Accordingly, counsel's actions did not constitute ineffectiveness.

10. Failure to Seek Recusal of Trial Judge

Petitioner claims that counsel were ineffective in failing to seek the recusal of the trial judge on the grounds that before the trial he stated off the record that he would not approve additional funds for the defense counsel's motions. Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown because Petition had not shown that the trial judge's statement would have provided a basis for recusal. *State Habeas Order*, at 49.

So, too, here, Petitioner has failed to show grounds for the trial judge's recusal. As such, Petitioner cannot demonstrate a reasonable probability that but for counsel's actions the results of the proceedings would have been different. Accordingly, Petitioner has not demonstrated ineffectiveness under Strickland.

11. Failure to Object to Hearsay

Petitioner asserts that counsel was ineffective in failing to object to the prosecutor's introduction into evidence the [sic] prejudicial statements by the victims' family members about alleged conversations with Petitioner but accepting the prosecutor's argument that statements by Petitioner to his family were hearsay. Petitioner raised this claim in his state habeas petition. But, the state habeas court found that no attorney error or prejudice had been shown, because the statements by the victims' family members were not prejudicial on their face since they related to counsel's attempts to portray Petitioner's domestic situation as "too pressurized" for him. *State Habeas Order*, at 64. This Court finds that Petitioner has failed to demonstrate a reasonable probability that but for counsel's actions the result of the proceeding would have been different. Accordingly, Petitioner has failed to show ineffective assistance of counsel in this regard.

J. Miscellaneous Claims

In the instant petition, Petitioner has propounded three other claims for relief. First, Petitioner argues that the trial court's charge on intent during both the guilt/innocence and sentencing phases of trial improperly shifted the burden of proof of the crucial element of intent to Petitioner, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The court charged the jury as follows:

> Intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt. Intent may be shown in many ways, provided you, the jury believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct or it may be in your discretion inferred when it is the natural and necessary consequences of the act. Whether or not you draw such an inference is a matter solely within your discretion. . . . You may infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the product of his will. And, you may infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his acts.

T. 1043-44. Petitioner contends that the court's charge allowed the jury to infer that Petitioner intended the ordinary consequences of his voluntary act, in violation of the Fourteenth Amendment's requirement that the State prove every element of the offense beyond a reasonable doubt.

Petitioner raised this claim in his state habeas petition. The state habeas court found that this claim had been procedurally defaulted. *State Habeas Order*, at 74.

The court also found that Petitioner had not shown actual prejudice, because the charge given by the trial court was not burden shifting. *Id.* at 74-75.

This Court finds that Petitioner has failed to make the requisite showing of cause and prejudice excusing the

default or a fundamental miscarriage of justice. Accordingly, he is not entitled to relief on this ground.

Second, Petitioner maintains that the State deprived him of his right to counsel by not ceasing interrogation upon his request for an attorney. Petitioner raised this claim in his state habeas petition. The state habeas court found that this claim had been procedurally defaulted. *State Habeas Order*, at 15. And, Petitioner bad failed to show any actual prejudice, because the Petitioner's Sixth Amendment rights had not attached yet. *Id.* Furthermore, the Supreme Court of Georgia had already found that Petitioner's statement was knowingly and voluntarily entered and that there was no evidence that he had requested and was refused counsel. *Id.* at 16. *See Hightower*, 386 S.E.2d at 511. This Court finds that Petitioner has failed to demonstrate cause and prejudice excusing the default or a fundamental miscarriage of justice. As such, this claim does not warrant habeas relief.

Finally, Petitioner claims that there was an improper form of the jury verdict because it did not indicate that they [sic] jury found the existence of a certain aggravating factor "beyond a reasonable doubt." Petitioner has not raised this claim previously, so it has not been exhausted. Accordingly, this court must treat it as procedurally defaulted. O.C.G.A. § 9-14-51. After reviewing Petitioner's claim and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of course and prejudice excusing the default or fundamental miscarriage of justice. Accordingly, Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

After carefully reviewing Petitioner's habeas petition and briefs in support as well as the State's briefs, the record

of the trial proceedings, the decision of the Supreme Court of Georgia, and the state habeas proceedings and order, the Court finds no grounds upon which to grant Petitioner relief. Accordingly, Petitioner's 2254 petition (tab # 16) is hereby **DENIED**. Additionally, Petitioner's motion to take depositions and for order requiring the state to answer requests for discovery (tab # 31) is also hereby **DENIED**.

SO ORDERED, this [4] day of August, 1998.

/s/ Duross Fitzpatrick

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

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515 U.S. 1162, 115 S. Ct. 2618, 132 L.E.d.2d 860

John Washington HIGHTOWER, petitioner, v. Albert G. THOMAS, Warden

No. 94-8920

June 26, 1995.

Rehearing Denied Sept. 1, 1995.

See 515 U.S. 1183, 116 S. Ct. 30.

Petition for writ of certiorari to the Supreme Court of Georgia denied.

Supreme Court of the United States

No. 04A157

John Washington Hightower,

Applicant

v.

Derrick Schofield, Warden

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 1, 2004.

/s Anthony Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 23rd
day of August, 2004.

Expert Statement of Gary L. Liberson, PhD.

QUALIFICATIONS

I received my undergraduate degree in applied mathematics and computer sciences from Washington University in St. Louis, Missouri, in 1968. I received a masters degree in statistics in 1971 and a Ph.D. in mathematical statistics in 1981, both from the George Washington University in Washington, D.C.

From 1971 to 1975 1 was employed as a statistician with the Office of Economic Opportunity in Washington, D.C. In that position, I reviewed and analyzed statistical data to determine whether there was discrimination in hiring and employment practices.

From 1975 to 1980, I was Chief of the Program Integration Branch of the Office of Analysis and Evaluation at the Environmental Protection Agency ("EPA"). My responsibilities included developing statistical analysis for environmental regulations governing industrial discharges into waste water. At the request of the EPA administrator, I served as a hearing officer to determine the statistical validity of various methodology proposed by the oil industry and EPA for compliance with various environmental regulations.

From 1980 to 1984, I was employed in the private sector, first as a. division director for Sciences Applications, Inc., and then as Vice President of Environmental Risk Assessment Service (USA). In those positions, I was responsible for general statistical analysis of various environmental and health studies.

From 1984 to 1990, I was self-employed as a consultant. In this capacity, I analyzed statistical sampling and quality control of various environmental regulations and performed statistical analyses for several private firms.

In 1989, I was retained by counsel for then Georgia death-row inmate Jimmy Lee Horton to perform statistical analysis regarding the peremptory strikes exercised by prosecutor Joseph Briley in all criminal trials for which there were available data, including the trial of John Hightower. From my analysis, I concluded that the probability that Mr. Briley's peremptory strikes were exercised in those cases without regard to race of the juror was substantially less than one chance in 100,000. From the same data, I also concluded that the probability that Mr. Briley's peremptory challenges were exercised without regard to the race of the defendant was also substantially less than one chance in 100,000. *See* Report of Gary L. Liberson, attached hereto as Exhibit 1. Thus, I concluded there was an extremely high correlation of strikes to race in cases prosecuted by Mr. Briley. I still hold these same opinions. The Federal Court of Appeals for the Eleventh Circuit discussed my report in depth in granting Mr. Horton" request for habeas corpus relief. *See Horton v. Zant*, 941 F.2d 1449, 1457-59 (11th Cir. 1991), attached hereto as Exhibit 2.

From 1990 to the present I have been a Principal of Environmental Risk Sciences, Inc. ("ERS"), in Washington, D.C. I co-founded ERS in January, 1991. ERS performs statistical analyses for a diverse selection of clients in an array of fields.

UNDERTAKING

I have agreed to assist counsel for petitioner John Hightower to analyze the peremptory strikes exercised by

Mr. Briley in the Hightower trial to determine the likelihood that Mr. Briley acted in a race neutral manner in that case.

DATA

I base my analysis on the data incorporated in the table and chart entitled: "John Hightower Jury Selection - Race," attached hereto as Exhibit 3, as well as the list of potential jurors, attached hereto as Exhibit 4. These data show, in summary:

Mr. Hightower's jury included nine white jurors and three black jurors. Mr. Briley exercised six of seven peremptory challenges to strike black potential jurors.[1]

If both Mr. Briley and the defense had used the full allotment of peremptory strikes, a total of 42 potential jurors would have been considered for a position on the jury (10 prosecution strikes + 20 defense strikes + 12 seated jurors = 42 potential jurors).

Twenty-four of these 42 potential jurors were white; 14 were black.[2]

ANALYSIS

I performed two separate analyses of the relevant data in the Hightower case. Together, they demonstrated that the probability that Mr. Briley exercised his peremptory challenges in a race neutral manner is negligible, somewhere

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[1] *See*, Exhibit 3; Tr. Transcript at 600-09, attached hereto as Exhibit 5.

[2] Potential jurors 2, 3, 14, 23, 24, 27, 28, 29, 32, 33, 34, 37, 38 and 39 were black.

between 1 in 308 (0.32% probability) and 1 in 8,855 (0.01% probability).

1. It is Extremely Unlikely that Mr. Briley Would Exercise Six of Seven Peremptory Strikes Against Blacks in a Pool Containing Twice as Many Whites Than Blacks Unless His Strikes Were Race-Related

My first inquiry considered the probability that Mr. Bliley would exercise at least six out of seven peremptory strikes against blacks in a pool of 42 potential jurors (28 whites and 14 blacks). If Mr. Briley had exercised his peremptory strikes without regard to the race of the prospective juror, the likelihood he would use at least six of seven strikes against blacks is only 1 in 308. If we look only at the 35 potential jurors who were actually considered (24 whites and 11 blacks), the likelihood that at least six of seven strikes would be used against blacks falls to 1 in 589. Quite simply and obviously, the fact that Mr. Briley used six of seven peremptories against blacks in a group that contained twice as many whites as blacks is highly consistent with the hypothesis that his strikes were based on race, and it is extremely unlikely that his strikes had nothing to do with race.

Thus, my analysis of the race of prospective jurors struck by Mr. Briley from the Hightower jury is entirely consistent with my analysis of his peremptory strikes in all capital cases throughout his career, including both the *Horton* case and this one. *See* Exhibit 1. The race of the prospective juror explains Mr. Briley's strikes extraordinarily well, from a statistician's perspective.

2. Mr. Briley Minimized the Number of Blacks on the Jury

I next analyzed the probabilities that the Hightower jury would be racially mixed regardless of whether Mr. Briley exercised his peremptory challenges in a racially biased manner. This analysis required a comparison between two scenarios. *See* Exhibit 3.

Scenario 1 was based on the hypothesis that there was no racial bias in the selection of jurors. I began by measuring the probability that at the beginning of the final selection process, absent bias, the jury would contain one or more blacks. Given the actual racial composition of the pool of 42 potential jurors, the probability of a racially mixed jury was 99.7% at the beginning of jury selection, assuming race-neutral strikes. The remainder of Scenario 1 indicates the likelihood after each prospective juror was struck or seated that the resulting jury would have one or more additional black jurors (no matter how many blacks had already been seated) assuming race-neutral challenges.

Scenario 2 analyzed the probability that the jury would be racially mixed *even if Mr. Briley had used all of his peremptory challenges against blacks*. This scenario indicates the probability before jury selection started, and then after each successive prospective juror was struck or seated, that the resulting jury would include at least one additional black juror (no matter how many blacks had already been seated), *even if Mr. Briley did everything in his power to keep blacks off the jury.*

The results are displayed both in table form and as a graph in Exhibit 3. The table shows that at the beginning of the selection process there was a 99.7% chance that at least one black juror would be seated on the jury *if* all peremptory

strikes were race-neutral (Scenario l). Scenario 2 shows that even if Mr. Briley did everything in his power to strike blacks from the jury, there would still be an 86.5% probability that one or more blacks would sit on the jury. *In other words, it was clear from the beginning of the peremptory strike process that even if Mr. Briley exercised every one of his peremptory challenges against blacks, he nevertheless had less than one chance in seven of seating an all-white jury.*

For the first twenty-three potential jurors, Mr. Briley did do everything in his power to exclude blacks from the jury. He struck all four black potential jurors he faced and passed on all nineteen white potential jurors he faced. At the end of that series six white jurors — half the panel — had been seated. *See* Ex. 3.

I evaluated the probability that Mr. Briley's use of peremptory strikes while selecting; the first half of the jury was race neutral. Given the fact: that Mr. Briley used four peremptory strikes against the first twenty-three jurors, the probability that those four strikes were exercised in a race-neutral manner against the only four blacks in that group is one in 8,855.[3] Thus, the statistical evidence that Mr. Briley's first four strikes were racially motivated is overwhelming.

Despite Mr. Briley's decision to strike all the blacks and pass on all the whites during consideration of the first 23 potential jurors, the likelihood that he would be able to seat an all-white jury had actually dropped substantially by the time he reached potential juror #24. At that point, the probability of a racially mixed jury had risen from 86.5% (at the beginning of jury selection) to 95.1%, even if Mr. Briley

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[3] This figure is arrived at as follows: 4/23 x 3/22 x 2/21 x 1/20 = 1/8855.

continued using all his strikes against blacks.[4] Thus, when Mr. Briley decided not to strike black potential juror #24, it was statistically almost certain that there would be one or more blacks on the jury no matter what Mr. Briley did.

As the table shows, even after potential juror #24 was seated on the jury (pre juror#25), Mr. Briley still faced an 841% likelihood that one or more additional black jurors would be seated, even if Mr. Briley used all of his remaining peremptory strikes against blacks. By the time Mr. Briley reached black potential juror #27, this likelihood had increased to a new high of 95.5%, not far from the 99.5% likelihood that at least one additional black juror would be seated on the jury even if Mr. Briley used his peremptory strikes in a race-neutral manner (Scenario 1). Thus, when Mr. Briley allowed black potential juror #27 to be seated on the jury, it was virtually certain, from a statistical perspective, that two or more blacks would be seated on the jury no matter how Mr. Briley used his remaining strikes.

Even after Mr. Briley let black juror #27 onto the jury, he still faced an 83.3% probability that he would not be able to avoid seating a third black juror (Scenario 2).[5] Thus, when he allowed black potential juror #28 to be seated on the jury, Mr. Briley gave in to the overwhelming probability that a third black juror would be seated no matter what Mr. Briley did.

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[4] If Mr. Briley acted in a race-neutral manner from that point on, the chances of seating at least one black juror would be 99.7% (Scenario 1).

[5] If Mr. Briley acted in a race-neutral manner from this point onward, there would still be a 97.4% probability that a third black juror would be seated on the jury (Scenario 1).

CONCLUSION

Based on the foregoing statistical analyses, including my earlier work relied on by the Eleventh Circuit in the Horton decision, I conclude that it is extremely unlikely — far less than a 1% probability, from a statistical perspective — that Mr. Briley's peremptory strikes were exercised in a race-neutral manner in the Hightower case. Mr. Briley's strikes appear, from a statistical perspective, to be very closely related to the prospective juror's race, and I know of no other variable that could explain them. In my professional opinion, there is a probability well in excess of 99% that Mr. Briley's six strikes of black prospective jurors in the Hightower case were made on the basis of race. Put simply, Mr. Briley's actions in exercising his peremptory strikes were consistent with the behavior of someone whose goal was to minimize the number of blacks on the jury.

/s/ Gary L. Liberson

Gary L. Liberson, Ph.D.

November 22, 1996

John Washington HIGHTOWER,
Petitioner-Appellant,

v.

Derrick SCHOFIELD,
Respondent-Appellee,

United States Court of Appeals,
Eleventh Circuit.

April 12, 2004.

Background: Petitioner, convicted in state court of murder and sentenced to death, 259 Ga. 770, 386 S.E.2d 509, sought federal habeas relief. The United States District Court for the Middle District of Georgia, No. 96-00097-3:CV-DF, Duross Fitzpatrick, J., denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Tjoflat, Circuit Judge, held that:

(1) petitioner had no due process right to psychiatric assistance;

(2) even if petitioner had right to psychiatric assistance, trial court met its obligations under due process clause;

(3) state court's determination that claim that prosecutor's participation in hearings on petitioner's requests for funds to retain psychiatric expert violated due process was subject to harmless error analysis was not contrary to, or unreasonable application of, federal law;

(4) any error in not providing ex parte hearings on requests for funds was harmless;

(5) petitioner failed to provide evidence discrediting prosecutor's specific, non-racial reasons for using peremptory strikes against African–Americans;

(6) claim that trial court seated two jurors who were impermissibly predisposed toward death sentence was procedurally defaulted; and

(7) counsel did not render ineffective assistance.

Affirmed.

Wilson, Circuit Judge, filed concurring opinion.

John C. Peirce (Court–Appointed), Timothy Keith Armstrong (Court–Appointed), Howrey, Simon, Arnold & White, LLP, Washington, DC, for Petitioner–Appellant.

Susan V. Boleyn, State Law Dept., Atlanta, GA, for Respondent–Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, ANDERSON and WILSON, Circuit Judges.

TJOFLAT, Circuit Judge:

Petitioner John Washington Hightower, a Georgia prisoner, seeks a writ of habeas corpus setting aside his 1988 convictions and sentences for capital murder. The district court denied his petition. We affirm.

I.

The Supreme Court of Georgia summarized the facts of this case as follows:

> The defendant was married to Dorothy Hightower. Her brother stopped by their home early in the morning of July 12, 1987, to pick up his daughter. Dorothy Hightower's car was gone. The brother entered the home and found that Dorothy Hightower and her two daughters, Evelyn and Sandra Reaves, had been shot. Evelyn Reaves was still alive, but died two days later. Sandra Reaves and Dorothy Hightower were dead. The brother's daughter was unharmed.
>
> Two and one-half hours later, the defendant was arrested driving his wife's car. Inside the car was a bloody handgun. He confessed later that morning. He told police that he and his wife had been having marital problems, and he had purchased the murder weapon the day before. He hid it under his pillow until 3:00 a.m., when he shot his wife. He then went to the bedroom occupied by his stepdaughter Sandra Reaves. She got out of bed, but then lay back down. He shot her in the head. Evelyn Reaves tried to leave the house, but the defendant caught her and shot her three times.

Hightower v. State, 259 Ga. 770, 386 S.E.2d 509, 510 (1989).

After a trial held from April 28, 1988, to May 4, 1988, a jury in Morgan County, Georgia,[1] convicted Hightower of three counts of murder. In the penalty phase, the jury found an aggravating circumstance as to each murder, namely, that Hightower had committed each murder in the course of the commission of another murder.[2] The jury recommended death sentences on each of the three counts of murder. The trial court entered these sentences as required by Georgia law.[3]

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[1] Hightower was indicted in Baldwin County on July 14, 1987. At a hearing on January 15, 1988, the superior court granted Hightower's motion for a change of venue, and or dered that venue be changed to Morgan County for trial. On February 25, 1988, the court quashed the indictment on the ground that African-Americans were underrepresented on the venire from which the grand jury had been drawn. A new indictment was returned on March 18, 1988, and Hightower was arraigned on April 15, 1988. On April 20, 1988, the superior court issued an order nunc pro tune January 15, 1988, incorporating into the record of the new case all motions, orders, and rulings from the earlier case.

[2] O.C.G.A. § 17-10-31 requires that a death sentence be supported by "a finding of at least one statutory aggravating circumstance." One sufficient aggravating circumstance for murder is that it "was committed while the offender was engaged in the commission of another capital felony or aggravated battery." O.C.G.A. § 17-10-30. Hightower's jury found that (1) the murder of Dorothy Hightower was committed while Hightower was engaged the commission of the murder of Evelyn Reaves, (2) the murder of Sandra Reaves was committed while Hightower was engaged in the commission of the murder of Dorothy Hightower, and (3) the murder of Evelyn Reaves was committed while Hightower was engaged in the commission of the murder of Sandra Reaves.

[3] O.C.G.A. § 17-10-31 provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death."

Hightower sought, but was denied, a new trial. The Georgia Supreme Court affirmed Hightower's convictions on direct appeal, *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989), and denied his motion for reconsideration. The Supreme Court of the United States denied Hightower's petition for a writ of certiorari, *Hightower v. Georgia*, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), and his petition for rehearing, *Hightower v. Georgia*, 498 U.S. 995, 111 S.Ct. 549, 112 L.Ed.2d 557 (1990).

Hightower then petitioned the Superior Court of Butts County, Georgia, for a writ of habeas corpus. After an evidentiary hearing, the court denied his petition.[4] The Georgia Supreme Court denied Hightower's application for probable cause to appeal and his subsequent motion for reconsideration. The Supreme Court of the United States denied Hightower's petition for a writ of certiorari, *Hightower v. Thomas*, 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995), and his petition for rehearing, *Hightower v. Thomas*, 515 U.S. 1183, 116 S.Ct. 30, 132 L.Ed.2d 912 (1995).

Having pursued all state court avenues of relief, Hightower sought habeas corpus relief in the United States District Court for the Middle District of Georgia. The district court denied his petition, concluding on the basis of the records of the state court proceedings that none of his claims had merit.[5] The district court thereafter granted

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[4] Hightower petitioned that court because he was incarcerated in Butts County.

[5] The court also denied Hightower's Federal Rule of Civil Procedure 59(e) motion to alter and amend the judgment.

Hightower's application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c), concluding that he had made a "substantial showing of the denial of a constitutional right" with respect to each of his claims.[6] In this appeal, however, Hightower challenges the district court's disposition only of a portion of his claims. He contends that the state trial court committed constitutional error by (1) failing to provide him with the assistance of a qualified psychiatrist as required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and by neglecting to conduct hearings on his Ake requests ex parte; (2) allowing the prosecutor peremptorily to strike African–Americans from the jury, in contravention of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and (3) permitting jurors unconstitutionally biased in favor of the death penalty to serve on his jury. He also claims that his two court-appointed lawyers provided constitutionally

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[6] Hightower has abandoned the following claims by not including them in his brief:

> (1) the prosecutor engaged in various forms of misconduct before and during the trial, depriving him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fair trial and a reliable sentencing proceeding; (2) the trial court violated his rights under the Fifth and Fourteenth Amendments by failing to have all proceedings against him transcribed and made part of the record; (3) the State obtained his confession and used it against him at trial in contravention of the Fifth, Sixth, Eighth, and Fourteenth Amendments; (4) the trial court violated his rights under the Eighth and Fourteenth Amendments by providing misleading and incomplete instructions to the jury during the penalty phase of his trial; (5) the trial court violated his Fourteenth Amendment due process rights by allowing the prosecutor to introduce allegedly inflammatory victim impact evidence; and (6) his attorneys were constitutionally ineffective in numerous ways beyond those cited in his brief to us.

ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

II.

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which amended the federal habeas corpus provisions of 28 U.S.C. § 2254. Because Hightower filed his habeas petition after the AEDPA's effective date, that law's provisions apply. *Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9 (2001).

As amended by AEDPA, 28 U.S.C. § 2254 states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
>
> or
>
> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As the Supreme Court has held,

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). The phrase "clearly established Federal law," as that term appears in section 2254(d)(1), "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Id.* at 412, 120 S.Ct. at 1523. Furthermore, a habeas petitioner can overcome a state court's "presumption of correctness" on factual determinations only by coming forth with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

[1, 2] As a general rule, in reviewing a district court's grant or denial of a habeas petition, we review the district court's findings of fact for clear error, and review de novo both questions of law and mixed questions of law and fact. *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000). In this case, because the district court "neither held an evidentiary hearing nor made any independent findings of fact," we review its holdings de novo, mindful that "we (like the district court) are reviewing, in essence, [the] decision[s]

of the courts of Georgia." *Putman v. Head*, 268 F.3d 1223, 1240 (11th Cir.2001).

III.

Hightower raises two separate claims under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). We address these in turn.

A.

Hightower first claims that he was denied his rights under Ake to the assistance of a competent psychiatrist. Hightower unsuccessfully raised this claim on direct appeal to the Georgia Supreme Court.[7] *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 511 (1989). Thus, under 28 U.S.C. § 2254(d), for Hightower to prevail on this claim, the decision of the Georgia Supreme Court must have been "contrary to, or ... an unreasonable application of, clearly established" United States Supreme Court precedent, or "based on an unreasonable determination of the facts in light of the evidence." We hold that it was not. Because Hightower failed to make the threshold showing required to trigger his rights under *Ake*, and received defense funds that he could have used for a psychiatric expert, his claim fails.

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[7] Hightower later brought this claim before the Superior Court of Butts County. That court refused to review the claim, citing *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986). Gunter held that an "issue ... actually litigated, i.e., raised and decided [on] direct appeal ... cannot be reasserted in habeas corpus proceedings" in Georgia state courts. *Id.* at 644-45 (citations omitted).

1.

The Supreme Court in *Ake* considered the constitutional right of indigent criminal defendants to psychiatric assistance. In that case, Ake, the defendant, notified the trial court during a pretrial conference of his intention to raise an insanity defense, and requested the appointment of, or funds to hire, a psychiatrist. *Ake*, 470 U.S. at 72, 105 S.Ct. at 1090. The court denied the request. Id. at 72, 105 S.Ct. at 1090-91. At the guilt phase of Ake's trial, "there was no expert testimony for either side on Ake's sanity at the time of the offense," even though "his sole defense was insanity." *Id.* at 72, 105 S.Ct. at 1091 (emphasis omitted). The jury found him guilty. *Id.* at 73, 105 S.Ct. at 1091. At the sentencing phase, Ake, without a psychiatric expert, could not rebut the testimony of state psychiatrists who claimed he was "dangerous to society," and could not "introduce on his behalf [psychiatric] evidence in mitigation of his punishment." *Id.* at 72, 105 S.Ct. at 1091. The jury returned a death sentence. *Id.*

The Supreme Court ruled in Ake's favor, holding under the Due Process Clause of the Fourteenth Amendment

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. at 83, 105 S.Ct. at 1096. The Court found that the trial court was adequately "on notice" that "Ake's mental state at the time of the offense was a substantial factor in his

defense," *id.* at 86, 105 S.Ct. at 1097, due in large part to the following facts: (1) Ake's sole defense was insanity; (2) the trial court, sua sponte, had ordered that Ake be examined by a psychiatrist to determine the cause of his "bizarre" behavior at arraignment; (3) a state psychiatrist later found Ake incompetent to stand trial; (4) Ake was deemed competent "only on the condition that he be sedated" with medication during the trial; and (5) psychiatrists who examined Ake for competency did so within six months of the offense, and opined that his "mental illness might have begun many years earlier." *Id.* at 86, 105 S.Ct. at 1098.

[3, 4] Because "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding," *id.* at 82, 105 S.Ct. at 1096, the right to psychiatric assistance is not automatic. Rather, this right hinges upon the sufficiency of the defendant's preliminary showing to the trial court that there is a "substantial basis for the defense" that the expert will assist in presenting. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.1987) (en bane). While defense counsel "cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide," he is nonetheless "obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert" to the defense. *Id.* The trial court must then examine the evidence before it, make all necessary inferences, and determine whether the provision of psychiatric assistance is warranted.

In reviewing an *Ake* claim like Hightower's, we look to

> the reasonableness of the trial judge's action at the time he took it. This assessment necessarily turns on the sufficiency of the

> petitioner's explanation as to why he needed an expert. That is, having heard petitioner's explanation, should the trial judge have concluded that unless he granted his request petitioner would likely be denied an adequate opportunity fairly to confront the State's case and to present his defense?

Id. at 710. The sources available to the trial court in considering Hightower's request for psychiatric assistance included (1) written motions and exhibits, (2) defense counsel's representations at pretrial proceedings, and (3) Hightower's behavior at pretrial proceedings. We "[place] ourselves in the shoes of the trial judge [and] analyze the information he received as it was brought before him." *Messer v. Kemp*, 831 F.2d 946, 961 (11th Cir.1987) (en bane). In so doing, we conclude that Hightower failed to satisfy his preliminary burden under Ake, and was therefore not entitled to the services of a psychiatrist.

a.

[5] Hightower's attorneys first notified the trial court of their desire for expert psychiatric assistance in a written motion dated August 6, 1987. The full text of the motion reads as follows:

Motion for Funds to Hire Independent Psychiatrists

1. The defendant, John Hightower, was arrested on July 10, 1987, and charged with three counts of Murder.

2. The said Defendant was indicted by the Baldwin County Grand Jury on July 14, 1987, for said offenses.

3. The District Attorney of Baldwin County, Georgia, Mr. Joseph Briley, has announced that he intends to seek the death penalty in the prosecution of said case.

4. Counsel for Defendant feel that the defendant's mental state, together with the presence or absence of any mental disorder or disease, may be of importance in the defense of said action.

5. Defense counsel were appointed by this Honorable Court to represent the Defendant, the said Defendant having been found previously indigent by this Court.

6. Defendant is without sufficient funds of any kind with which to hire independent psychiatric or psychological experts, and feels that the same would be needed in order to insure him all of his due process rights under the Georgia and the United States Constitutions.

7. Defendant believes that independent psychiatric and/or psychological evaluations need to be accomplished in order to assure that any and all defenses can be properly presented at trial.

Wherefore, Defendant prays that funds be provided to his counsel of record for the purpose of employing independent psychiatric and/or psychological experts in the defense of his case.

This 6th day of August, 1987.

/s/ Hulane E. George, Attorney for Defendant

B. Carl Buice, Attorney for Defendant

The court heard arguments on this and other motions at a hearing on August 31, 1987. At the hearing, the court asked defense counsel whether they intended to "make a motion for an examination at Central State Hospital." They answered in the negative, and asked that the court consider instead their motion for funds to hire an independent psychiatrist. The court, pursuant to *Ake*, ordered counsel to make a preliminary showing that Hightower's sanity at the time of the offense was likely to be a significant factor at trial. Carl Buice, one of Hightower's two attorneys,[8] offered the following:

> May it please the Court. Where we are at this point in this issue is at a very preliminary threshold because if we were not there we would get into a very circuitous situation. Obviously in order to determine clearly what we are going to need in the way of psychiatric testimony we need the help of a psychiatrist. It is not possible to evaluate fully the mental condition of the defendant without professional assistance to assist us in doing that and if the Court would note, the *Ake* decision does not just have to do with the defense of insanity, but goes on to talk about whether the mental condition of the defendant is going to be a factor at the trial of the case which has to do not only with the

[8] The court initially appointed Alan Thrower to represent Hightower. On July 17, 1987, 5 days after the murders, the court granted Thrower's motion to be relieved as counsel due to a conflict of interest. Four days after granting the motion, the court appointed Hulane E. George and B. Carl Buice to represent Hightower. George and Buice were a married couple who were also law partners. They served as Hightower's counsel both at trial and on direct appeal.

guilt/innocence phase or any plea of not guilty or of guilty but insane or not guilty for reasons of insanity, but also in the area of litigation and extenuation in terms of whether there are any characteristics of the defendant which would be mitigating of the circumstances in the event that he was convicted. Now, the only thing we can present to the Court at this point in the absence of having expert testimony is that which is already apparent in the record. That is, that we have here a man who is charged with three murders, the murder of his wife and two stepdaughters. This comes in a situation in a life history in which there has been no previous violence. We have a situation where a person of no demonstrated erratic behavior performs an act which is in and of itself according to the charge of the district attorney, stunningly abhorrent. The event itself, the facts themselves raise the question of the mental state of the defendant and the circumstances which would lead up to such an event, not just in terms of insanity which, of course, is a legal term and not a mental health term, but in terms of all the factors in the defendant's psyche which might relate to this event and be important in the defense of his case, not only in the defense in the guilt and innocence phase, but in any phase of the trial in extenuation and mitigation. So, what we are asking for at this point in regard to this particular thing is some preliminary funds for a psychiatric evaluation on the part of a psychiatrist who is a part of

> the defense team who has—to whom we have access and with whom we can consult in the building of our defense of this man so that we can know what further issue we may need to raise in terms of psychiatric evaluation, what defenses we need to file in terms of this man's condition, whether we have defenses which are defenses in the guilt/innocence phase or are just issues in the extenuation or sentencing phase. All of these are matters that we cannot determine without having the benefit of counsel from a competent psychiatrist, someone trained in the mental health field who can help us know what to look for in terms of this man's personality. This is no small issue in a case of this nature. The mental state of the defendant is going to be a key factor all the way through and if we are to provide him with an adequate defense, if we are to be able to raise the issues which need to be raised in this case or at least consider the issues which may need to be raised, we need that expert assistance ab initio from the very beginning. To make us—to require us to make a showing in terms of some professional evidence in the case where we have no authority to get a professional to develop the evidence and have no resource to a professional to determine what sort of issues may be available to us, denies us of access to that whole area of defense from the very beginning.

In response to this statement, the court asked Buice how much money they needed for a psychiatric expert. He

said they needed $750 "[o]n a preliminary basis, reserving the right to ask for an additional amount in terms of what we may find as we go forward." The court granted the motion and "authorize[d] [counsel] to expend up to" $750. The court also left open the possibility of granting more funds in the future, but only after another hearing.

At this point, the prosecutor moved that Hightower be admitted to Central State Hospital for a "psychological evaluation," so that the State could rebut any "claim as to mental incompetency" that the defense might raise at either phase of the trial. Defense counsel opposed the motion, stating that they would have Hightower evaluated by his own psychiatrist. The court asked when counsel intended to have Hightower examined by their psychiatrist. They said they planned to have him examined that very week. Buice, presumably referring to a psychiatric expert he had already contacted, added: "He has already done some preliminary interviews. He is in the process."

In response to the prosecutor's protests that the defense was merely seeking to "sandbag" the State by preventing it the opportunity to examine Hightower, the court purported to grant the prosecutor's motion. But given defense counsel's representation that Hightower would soon be evaluated by his own expert, the court delayed his transportation to Central State Hospital for two weeks.

We now place ourselves in the position of the trial court and evaluate the evidence as it was submitted. In doing so, we make several observations. First, defense counsel made no issue of Hightower's "present sanity," i.e., his competency to stand trial.[9] They opposed the prosecutor's

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[9] Nothing in the record indicates that High-tower's behavior at this hearing was in any way peculiar. Indeed, Hightower's competency to

attempt to have Hightower evaluated by a state psychiatrist, and from the record, it does not appear that the State ever had him evaluated. Second, by the time of the hearing, his lawyers had engaged the services of an unnamed mental health expert, and this expert had already done some unspecified "preliminary" work on the case. Third, presumably because they had already chosen their own expert, counsel requested only that the trial court grant them funds. They never raised the option of an appointed psychiatrist. Fourth, unlike in *Ake*, in which the trial court was so concerned about the defendant's peculiar behavior that he ordered a psychiatric examination *sua sponte*, neither the court, the prosecutor, nor defense counsel ever made an issue of Hightower's behavior at the hearing.[10] Fifth, defense counsel failed to offer any fact bearing upon Hightower's mental status apart from the mere occurrence of the crime itself. At the hearing, they merely pointed out that Hightower was accused of three "abhorrent" murders even though his behavior had never before been violent or "erratic."

Based upon these observations, we conclude that Hightower had at this stage failed to satisfy his preliminary burden under *Ake*. The trial court had no evidence upon which to conclude that his "sanity at the time of the offense [was] to be a significant factor at trial." *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096. Despite this, the court gave his attorneys precisely the sum they requested for a psychiatric expert. No constitutional error had yet occurred.

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stand trial does not appear ever to have been at issue, a point that Hightower himself makes in his brief.

[10] Nor has Hightower argued to us on appeal that his behavior should have given the trial court pause.

b.

As far as the record discloses, it was not until some three months later that the trial court dealt in any way with defense counsel's requests for expert psychiatric assistance. In an order dated November 25, 1987, the court, citing its authorization of $750 for the payment of a psychiatric expert, ordered the county to pay $440 to Dr. N. Archer Moore. Attached to the order is an itemized billing record detailing services Dr. Moore rendered in Hightower's case, which were as follows: (1) a one-hour interview with Hightower on August 25, 1987; (2) a two-hour interview with Hightower on August 28, 1987; (3) a two-hour interview with Hightower on August 31, 1987; (4) a one-hour interview with Hightower on November 16, 1987; and (5) a two-hour conference with Hightower's attorneys on November 17, 1987.

At this point, the court could discern the following. First, defense counsel had taken a portion of the funds they had received and used it to employ an expert of their choice, Dr. Moore. Second, Dr. Moore was a psychologist, not a psychiatrist.[11] Third, Dr. Moore had taken the opportunity to evaluate Hightower on four separate occasions for a total of six hours. Fourth, defense counsel had not yet exhausted the $750 that they had received for the specific purpose of hiring a psychiatric expert.

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11 The November 25 order does not identify this fact, though Dr. Moore's attached billing statement (1) recited his professional name as "N. Archer Moore, Ph.D.," (2) gave no indication that Dr. Moore possessed a medical degree in addition to his Ph.D., and (3) listed a single professional affiliation, the American Board of Psychology. The court from these facts alone could have assumed that Dr. Moore was a psychologist.

No additional funds were requested at this stage, and no error had yet occurred.

c.

Another three months passed before defense counsel presented the trial court with any additional information regarding a need for expert psychiatric assistance. On February 8, 1988, they filed a motion, which reads as follows:

Motion for Additional Funds to Hire Psychiatrist

8. On August 31, 1987, this Court granted the Defendant the sum of Seven Hundred Fifty ($750.00) [sic] to hire a psychologist and/or psychiatrist to evaluate the Defendant herein.

9. Defendant's counsels retained Dr. Archer Moore, of Macon, Georgia, to evaluate the Defendant. On the advise [sic] of Dr. Moore, Defendant's counsels were advised to seek a psychologist or psychiatrist who had extensive experience in dealing with family violence to evaluate the Defendant.

10. Dr. Emanuel Tanay, M.D., has been contacted by Defendant's counsel and has advised us that he would be able to provide forensic psychiatric services to Defendant. A copy of a letter from Dr. Tanay and a copy of his vitae is attached hereto as Exhibit "A" and is made a part hereof by reference.

11. Defendant requires the services of Dr. Tanay, if he is to adequately present not only his defense but to assist Defense counsel in the preparation of Defendant's case in the guilt/innocence phase as well as in the sentencing

phase. To deny these services is to violate Defendant's constitutional rights under the Constitutions of the United States and the State of Georgia.

WHEREFORE, Defendant herein moves that this Court order that Dr. Tanay [sic] services be ordered and that this Court sign an order providing that his services would be reimbursed up to Six Thousand ($6,000.00) Dollars.

This 8th Day of February, 1988.

/s/ Hulane E. George

B. Carl Buice

The first attachment to the motion was a letter to defense counsel from Dr. Emanuel Tanay, M.D., dated February 1, 1988. In this letter, Dr. Tanay, writing in response to an "extensive telephone conference" with defense counsel, expressed his willingness "to provide forensic psychiatric services" for Hightower at a reduced rate of $150.00 per hour plus expenses. Dr. Tanay estimated that his evaluation of Hightower would take at least twenty hours, and said that he required a court order to guarantee that he would be paid on an hourly basis for his testimony. In closing, Dr. Tanay stated that he could not evaluate Hightower before April 11, 1988.[12]

The second attachment to the motion was Dr. Tanay's curriculum vitae. It showed, among other things, that Dr. Tanay was a psychiatrist licensed in Michigan, Ohio, and Georgia, and that he was certified by the American

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[12] Although it does not appear that a trial date had yet been set, the court and the parties seemed at that point to have contemplated a trial in mid- to late-April 1988.

Board of Psychiatry and Neurology and by the American Board of Forensic Psychiatry. In addition, the curriculum vitae listed Dr. Tanay's numerous publications, some of which appeared by their titles to address legal issues related to insanity, mental illness, forensic psychiatry, and psychic trauma.

The trial court held a hearing on defense counsel's motion on February 9, 1988. At the hearing, counsel informed the court of the following:

> We have had Mr. Hightower evaluated by our psychiatrist, Dr. Archer Moore, and he advised us that we really needed someone who was an expert in family violence. And we have combed the United States, and we have been advised that this man—if you will look at his eight page vitae which is just a part of his vitae, you can see he is very well qualified. I spoke to Dr. Tanay and as he said in his letter, he could not evaluate Mr. Hightower until April the 11th of 1988, and he states that he will reduce his regular fee to $150 per hour plus expenses. His expenses includes [sic] coming from Detroit to Atlanta and renting a car. I figure probably somewhere around $6,000 for total expenses for Dr. Tanay. We desperately need his input in this case. We need it not only in the guilt-innocent phase but we need it in the sentencing phase. We need someone to evaluate Mr. Hightower and to give us some clues as to the causes of this tragedy. And he seems—according to everyone that we can

> talk to—is just about the only one in the United States that is available.

The prosecutor responded that the court had "bent over backwards already" in meeting Hightower's requests for psychiatric assistance, and had "gone further than *Ake*" required in this regard. Defense counsel answered:

> We are not asking or dealing with the issue of minimum requirement of the appellate courts. We're asking for substantial justice on the part of Mr. Hightower. To use just an ordinary psychologist in a case of this sort where the issues of domestic violence, a very specialized field, are at stake is rather analagous [sic] to using a general practitioner for brain surgery. If any accused person in Mr. Hightower's situation, who had the funds to do so, were in his place, certainly a specialist of this sort would be used. The only reason for not using a specialist of this sort in this sort of case would be a lack of funds. And if Mr. Hightower is therefore refused—denied the access to this sort of specialist simply because of lack of funds, we submit that it would be tantamount to a failure of due process.

The court then asked counsel if they could cite any authority that required the provision of additional funds. They could not. Instead, they reminded the court that they had received $750 at the last hearing, and that, as they understood it, they were entitled to come to the court again "if [they] needed more." The court then asked counsel how much money it had given them "to spend at [their] discretion." Counsel answered:

> We have $5,000—$5,750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had—we have hired a jury specialist and we have hired a special investigator and that will wipe out all of that money.

Without further argument, the court denied the motion for additional funds.[13]

We pause once again to consider whether the court committed error at this stage. We evaluate the additional evidence now available to the court and discern how it should have affected its actions. Several things are worth noting.

First, the court knew nothing of Dr. Moore's evaluation of Hightower save the dates and durations of the interviews. It was unclear at this point as to (1) whether Dr. Moore had been able to diagnose Hightower, (2) why Dr. Moore had "advised" defense counsel to seek an expert in "family violence," and (3) whether and in what phase defense counsel intended that Dr. Moore testify at trial.

Second, the court knew nothing about the probable value of Dr. Tanay's assistance. It knew only that (1) Dr. Tanay, unlike Dr. Moore, was a psychiatrist, and (2) defense counsel perceived Dr. Tanay to be an expert in the unexplained field of "family violence." Defense counsel made no issue of the former distinction,[14] but instead

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[13] Again, we note that the record bears no indication that Hightower's behavior at this hearing was in any way peculiar.

[14] Because we hold that Hightower had no right to an expert under Ake, we need not decide the question of whether a criminal defendant's *Ake*

grasped upon the latter distinction without explaining its significance. The most the court could glean from counsel's representations was that "family violence" was a "specialty" of psychology or psychiatry dealing with violent behavior in the context of family relationships. While a specialist of this kind might have been useful to Hightower, his attorneys essentially conceded at the hearing that their own notions of "justice," rather than the requirements of law, demanded the provision of such an expert.

Third, defense counsel provided no additional facts upon which to make an issue of Hightower's mental state. Indeed, although Dr. Moore had evaluated Hightower months beforehand, counsel still did not indicate that they would offer an insanity defense at trial.

Fourth, Hightower had not behaved peculiarly at any proceeding.

Based upon these observations, we conclude that Hightower still had not satisfied his preliminary burden under *Ake*. Months after they made their initial request for funds for a psychiatric expert, defense counsel still had not shown the court that Hightower's sanity was likely to be an issue at trial. That they had received expert funds in spite of this deficiency did not entitle them to more. No error had yet occurred.

d.

The issue next arose in the context of Hightower's motion for a continuance, filed March 2, 1988. This motion

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rights are satisfied by the provision of a psychologist rather than a psychiatrist.

contained no additional requests for funds for psychiatric assistance. Instead, in support of the request for a continuance, the motion offered the following information:

> Defendant has requested Dr. Emanuel Tanay to evaluate him as regards his defense and in the sentencing phase of this trial. Dr. Tanay has indicated to this Court that the first time he would evaluate Defendant would be on the week of April 18, 1988. Dr. Tanay would need time then to prepare his evaluation and discuss same with the defense counsel. There would not be enough time to accomplish this prior to the scheduled trial date. Dr. Tanay's testimony will be vital to Defendant's case in chief and to the sentencing phase.

On March 9, 1988, the court heard arguments on Hightower's motion. At the hearing, defense counsel told the court that they had sought Dr. Tanay's help, but that Hightower's family was "unable to come up with the money" to pay him. Counsel represented that Dr. Tanay "[had] to have at least $7,000 in his hand" and that he "[had] to have it, you know, like yesterday."[15] Counsel did not at this point request additional funds. Rather, they offered this information in support of their request for a continuance.

In opposing the motion for a continuance, the prosecutor argued that (1) the court had already given

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[15] In the February 8, 1988, Motion for Additional Funds to Hire Psychiatrist, as well as at the hearing on the same motion, defense counsel had requested $6,000.00. It is unclear from the record as to why counsel at the March 9, 1988, hearing increased to $7,000.00 their estimate of the costs of Dr. Tanay's services.

defense counsel a "lump sum of money ... a blanket amount that could be used for anything they wanted to use it for," including expert psychiatric assistance; (2) defense counsel had not made any showing to the trial court that Hightower was "psychiatrically deprived"; and (3) as a result, defense counsel must have wanted a psychiatric expert for mitigation purposes. In any case, the prosecutor argued, defense counsel had already received "ample time" in which to secure the services of a psychiatrist.

The court denied the motion for a continuance, but said it would reconsider it if circumstances later made it appear that the trial could not proceed as scheduled.

We distill the record to its essence to determine what additional evidence the court received at this stage regarding Hightower's need for a psychiatric expert. First, counsel still tentatively planned to retain Dr. Tanay, though they were uncertain as to how they would pay him. Second, they offered no additional facts bearing upon the issue of Hightower's mental state. Third, Hightower's behavior at the pretrial proceedings remained normal. Fourth, except in contending that Dr. Tanay's testimony would be "vital" to both the guilt and sentencing phases of trial,[16] counsel had said nothing about a possible insanity defense.

Defense counsel did not at this stage request any additional funds for a psychiatric expert, and the trial court had not erred.

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16 The court could have looked upon this contention dubiously, as Dr. Tanay had not yet evaluated Hightower.

e.

On April 15, 1988, the court held a hearing on various matters. In support of a renewed motion for a continuance, defense counsel told the court that they had "secured a psychologist who [would] be working with [them] in the preparation of [the] defense," and that this psychologist's involvement in a murder trial elsewhere in the state might cause him to miss Hightower's trial. The court denied the motion nevertheless.

Defense counsel then made a lengthy oral statement in support of their view that the court's rulings on their requests for funds for experts had rendered their assistance to Hightower ineffective as a matter of law. As for their requests for funds for psychiatric assistance, counsel stated that they had been unable to hire Dr. Tanay because of the court's denial of their February 2, 1988, motion for additional funds. In response, the prosecutor stated:

> But, Your Honor, there has been absolutely no indication on counsel's part that they intend to use insanity, a special plea of insanity, not guilty by reason of insanity or any of the other accepted defenses in this case which would even trigger the necessity of the Court appointing psychiatrists or rendering money to the defendants for a psychiatric review in this case. It is my understanding that what counsel is relying on in this case based on their statement is the mitigating circumstance testimony by a psychiatrist or a psychologist and counsel says that has been arranged.

At the end of the prosecutor's remarks, the court said that it would "adhere to all ... former rulings" on the issues that defense counsel had raised. The parties then addressed other pretrial matters. As far as the record discloses, Hightower's behavior at the hearing was unremarkable.

Once again, we evaluate the evidence put before the trial court. First, defense counsel had abandoned the idea of hiring Dr. Tanay, and had instead engaged the services of another psychologist in addition to Dr. Moore. Second, counsel offered no additional facts bearing upon Hightower's mental state. Although the case was now proceeding under the new indictment,[17] and in spite of the fact that trial was set to begin in only two weeks,[18] defense counsel still had said nothing about relying on an insanity defense. Third, because they had not expressed an intention to present an insanity defense, the court could infer that at least one of the two psychologists that counsel had engaged would testify during the sentencing phase. Fourth, nothing suggested that Hightower might be incompetent to stand trial.

The court had not yet received any indication that Hightower's sanity at the time of the offense would be an issue at trial, and had not erred.

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[17] See supra note 1.

[18] By letter of February 29, 1988, the court set the case for trial beginning April 28, 1988. Throughout the remainder of the pretrial stages, the court was unwilling to reconsider this trial date, even though Hightower's new indictment did not issue until March 18, 1988. In fact, trial proceedings began as scheduled on April 28, 1988, with voir dire of the jury venire. Hightower does not presently allege that the court erred in refusing to continue the trial.

f.

We have surveyed all pretrial proceedings at which Hightower presented the trial court with information bearing upon his need for a psychiatric expert. He has failed to identify any point in those proceedings at which the court, given the evidence then available, acted contrary to the requirements of federal law.

We are not unconcerned about putting the proverbial cart before the horse in cases of this kind. Without question, defense counsel may be unable fully to understand and explain his client's mental state until an evaluation is performed. But *Ake* does not require defense counsel to guide the trial court through the depths of the defendant's psyche; all it requires is a minimum threshold showing that the defendant's sanity at the time of the offense is likely to matter at trial. No such showing was made in this case.

2.

[6] Even if we assume that Hightower made the showing *Ake* requires, we hold that the trial court met its constitutional obligation under *Ake* by providing Hightower with defense funds that could have been spent on the services of a psychiatric expert.

In addition to the $750 it granted specifically for a psychiatric expert, the court gave Hightower a lump sum of $5,000 for defense expenses. In Hightower's view, it would have been improper under the circumstances for his lawyers to use any portion of this lump sum for a psychiatric expert. The Georgia Supreme Court decided to the contrary on direct appeal, finding instead that Hightower could have used this lump sum "for a special investigator or other such expert assistance as [he] might choose." *Hightower v. State*, 259

Ga. 770, 386 S.E.2d 509, 511 (1989). This finding of fact is entitled to a presumption of correctness, one that Hightower can rebut only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The thrust of Hightower's argument before us is that the court awarded the lump sum specifically in response to counsel's requests for funds for nonpsychiatric experts, i.e., demographers, jury specialists, and special investigators. Hightower points to the following exchange that took place between defense counsel and the court at the pretrial hearing on August 31, 1987:

THE COURT: All right. How much money are you asking for insofar as the special investigator is concerned?

MS. [sic] BUICE: Your Honor, I think that what we would like to have would be a sum of $5,000 to be able to proportion this between an investigator as well as a jury specialist. I had contacted a jury specialist and they have not called me back at this point. I believe the last information I got their fee was somewhere around $2,500, $1,500 to $2,500.

THE COURT: Well, I am going to deny your motion for a jury selection specialist. I am going to deny your motion for a demographer. What else did you ask for?

MS. GEORGE: Special Investigator.

THE COURT: I am going to grant your motion for a special investigator and authorize you to expend up to $5,000. Now, I am not going to require you to—if you want to spend your $5,000, part of it on a jury selection specialist, that's up to you. I'm just not going to provide any further

compensation beyond the $5,000 without an additional hearing.

According to Hightower, this dialog definitively establishes an understanding between his attorneys and the court that the $5,000 lump sum could be used for an investigator and a jury consultant, but not for any other purpose.[19] We disagree. Whatever one might conclude from reading this dialog in isolation, the record taken as a whole amply supports the supreme court's finding. First, at the hearings on February 9, 1988, March 9, 1988, and April 15, 1988, counsel referred to their defense funds as discretionary.[20] Second, Hulane George testified before the Butts County Superior Court that she and Buice "could [have] allocate[d] [the $5,000] however [they] wanted."

Third, the record shows that counsel actually used a portion of the $5,000 lump sum to pay for the services of a psychologist who testified on Hightower's behalf at trial. Dr. Howard Albrecht, Ph.D., testified for the defense during

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[19] Unfortunately, the parties have not cited, and we cannot find, any written embodiment of the court's order regarding the $5,000 lump sum.

[20] At the hearing on February 9, 1988, when defense counsel requested additional funds for a psychiatric expert, the court asked for a reminder of the sum it had already granted counsel "to spend at [their] discretion." They answered: "We have $5,000-$5,750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had—we have hired a jury specialist and we have hired a special investigator and that will wipe out all of that money." At the March 9, 1988 hearing, counsel told the court that it had given them "$5,000 to spend any way [they] wanted to and $750 for a psychiatric evaluation." At the April 15, 1988 hearing, counsel said that the court had given them "$5,000 for [a special investigator] and all other experts [they] wished to hire to assist [them]."

the sentencing phase of the trial.[21] After the trial concluded, George prepared,[22] and the court signed, an order for payment of Dr. Albrecht's services, which we reproduce here:

> *ORDER FOR PAYMENT OF PSYCHOLOGICAL EVALUATION*
>
> This Court having found the above-named Defendant indigent, and,
>
> HAVING ORDERED on August 31, 1987, the payment of Five Thousand ($5,000.00) Dollars for costs incurred in the defense of the above-styled case and the attached invoice in the amount of One Thousand ($1,000.00)

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[21] Throughout the record, confusion abounds as to the correct spelling of Dr. Albrecht's name. The index of the trial transcript, which includes the names of all testifying witnesses, lists him as "Dr. Harold Allbright." According to the transcript of his direct testimony, on the other hand, he at trial stated his name as "Howard Edward Allbright." Finally, the "Order for Payment of Psychological Evaluation" of May 17, 1988, matches how his name is printed on his attached letterhead invoice: "Howard E. Albrecht." We find the letterhead and accompanying motion most likely to be accurate and adopt his name as it is spelled there.

Lest we be concerned that there were 2 different psychologists with strikingly similar names (an unlikely scenario that would nonetheless wreak havoc with our reasoning regarding the May 17, 1988 order), we note that Dr. Albrecht's letterhead invoice, as well as the transcript of his trial testimony, both reflect the same practice location (Decatur, Georgia) and Georgia license number (748).

[22] The bottom left corner of the motion actually bears the mark of defense counsel's law firm: "Waddell, Emerson, George & Buice, Attorneys at Law, P.O. Drawer 630, Milledgeville, Georgia, 31061."

> Dollars being received from Dr. Howard Albrecht, Ph.D.;
>
> IT IS HEREBY ORDERED that the County Commissioners of Baldwin County, Georgia pay over to said Dr. Howard Albrecht the sum of One Thousand ($1000.00) Dollars on the behalf of John Hightower, indigent.
>
> This 17th Day of May, 1988.
>
> /s/ William A. Prior, Jr., Judge
>
> Baldwin County Superior Court
>
> This Order prepared by:
>
> Hulane E. George
>
> MILLEDGEVILLE, GEORGIA 31061

Attached to the order is Dr. Albrecht's "Invoice for Professional Services," addressed to defense counsel and dated May 18, 1988.[23] Without itemizing costs, the invoice merely recites a balance due of $1000 for "Forensic Psychological Consultation on the John Hightower case." Thus, defense counsel not only understood that they could use the $5,000 lump sum for a psychiatric expert—they actually did in the case of Dr. Albrecht, a psychologist who, like Dr. Moore, they had chosen themselves.[24]

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[23] We cannot tell why the order predated by 1 day the invoice that it purported to pay.

[24] The Georgia Supreme Court in its opinion on direct appeal stated: "[T]he defendant retained the services of a psychologist who testified at

The record is therefore replete with evidence showing that defense counsel could, and in fact did, pay for a psychiatric expert out of the $5000 lump sum the trial court granted for defense expenses.

Ake makes clear that no criminal defendant "has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at 83, 105 S.Ct. at 1096. To the extent that Hightower claims the trial court should have granted him funds sufficient to hire Dr. Tanay, therefore, he is mistaken. In giving Hightower $5,750 in discretionary defense funds, the court went further than Ake requires. There was no error.

B.

[7] Hightower also claims that the trial court violated his due process rights under *Ake* by permitting the prosecutor to attend and participate in hearings on his requests for funds for psychiatric experts. In Hightower's view, *Ake* demands that such hearings be conducted ex parte. Because Hightower raised this claim unsuccessfully on direct appeal to the Georgia Supreme Court, our review is once again limited by 28 U.S.C. § 2254(d).[25]

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trial. The court authorized an additional $1,000 to pay for the services of this psychologist." *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 511 (1989). This statement mischaracterizes the record. In fact, 2 psychologists testified at trial: Dr. Moore (during the guilt phase) and Dr. Albrecht (during the penalty phase). Dr. Moore was paid $440 by order of November 25, 1987, out of the $750 the judge granted at the hearing on August 31, 1987. Dr. Albrecht, on the other hand, was paid $1,000 by order of May 17, 1988, out of the $5,000 lump sum.

[25] Although the Georgia Supreme Court disposed of this claim without extended discussion, *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 511 (1989) ("The defendant has not shown any harm from the denial of

This issue first arose at the hearing on August 31, 1987, when defense counsel argued their August 6, 1987 "Motion for Funds to Hire Independent Psychiatrists." Citing *Ake*, they argued that they were entitled to present this motion "without either the presence or participation of the [prosecutor]." The court rejected this interpretation of *Ake* and permitted the prosecutor's presence at this and every subsequent hearing at which counsel requested funds for a psychiatric expert.[26]

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an ex parte hearing on the funds issue."), we agree with the district court that this claim was "adjudicated on the merits in State court proceedings" so as to trigger the provisions of 28 U.S.C. § 2254(d).

Hightower also raised this claim before the state habeas court, but that court did not address it.

[26] Upon considering defense counsel's *Ake* arguments at this hearing, the judge stated: "Well, I don't think-I don't think the word 'ex parte necessarily means the district attorney can't physically be present. I think it just simply means he can't participate." Hightower claims that the court, in spite of this interpretation, permitted the prosecutor to "participate actively" at this and every hearing at which his attorneys requested funds for a psychiatric expert. While this may be true, we do not view the presence/participation distinction as controlling in this particular case. Hightower does not merely claim that the court misapplied the correct standard, i.e., that his rights would have been adequately protected had the prosecutor been permitted to attend these hearings without participating. Rather, the thrust of Hightower's argument to us is that the prosecutor's mere *presence* at these hearings prejudiced his right to prepare his defense in secret.

Although defense counsel raised their ex parte objection at the August 31, 1987 hearing, it does not appear from the record that they raised the objection at any later hearing. No court to date has addressed whether Hightower thereby waives for purposes of appeal any errors occurring at these later hearings. We reject his claim on the merits without deciding this issue.

In support of his claim, Hightower points to the following language in *Ake*: "When the defendant is able to make an ex pane threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." 470 U.S. at 82-83, 105 S.Ct. at 1096. Hightower has expended substantial effort in seeking to convince us that the Supreme Court, through this single sentence, incorporated the ex parte requirement into *Ake*'s central holding. This effort is misdirected. Since Hightower raised this claim on direct appeal, we focus upon how the Georgia Supreme Court disposed of it, rather than how we would dispose of it on first impression.

The supreme court held simply that Hightower "[had] not shown any harm from the denial of an ex parte hearing on the funds issue." *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 511 (1989). Thus, the court, which cited no authority in support of its holding, did not in this case pass directly on the question of whether *Ake* requires ex parte hearings.[27] Instead, the court, in our understanding, held that even if Hightower had a right to be heard ex parte, he

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[27] Interestingly, 1 month before rendering its judgment in Hightower's case, the supreme court held in *Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81, 84 (Ga.1989), that an indigent criminal defendant's requests for funds for expert assistance should be heard ex parte. But the court did not base its holding upon the language of *Ake*. On the contrary, it stated that "[t]he *Ake* holding does not clearly mandate that [such] hearing[s] be ex pane." *Id.* at 83, 105 S.Ct. 1087. Hightower cries foul from the fact that the supreme court did not refer to *Brooks* when it addressed his ex pane claim. But Brooks is unhelpful to Hightower at this stage, as the plain language of that opinion states that *Ake* does not require ex parte hearings. Whatever the reason for the court's failure to apply *Brooks* to Hightower's case, we are unconcerned in a federal habeas proceeding with errors of state law. As we go on to discuss, the supreme court did not run afoul of federal law in disposing of Hightower's ex pane claim.

suffered no prejudice from the denial of this right. It is implicit in this reasoning that the right that Hightower claims, if it even exists, is subject to a harmless error analysis. Viewed in this light, his ex parte claim fails both in principle and in application.

First, Hightower has not shown that the supreme court committed legal error in implicitly holding that the denial of ex parte hearings can be harmless. We express no opinion as to whether this holding is correct.[28] Our review is instead limited to whether this holding was contrary to or an unreasonable application of the clearly established precedent of the Supreme Court of the United States. We hold that it was not. Hightower does not cite, and we cannot find, any clear Supreme Court precedent stating that the denial of ex parte hearings on requests for expert psychiatric assistance is beyond harmless error analysis.

[8] Second, Hightower has not shown that the Georgia Supreme Court erred on the question of prejudice. He contends that, as a result of the trial judge's refusal to conduct ex parte hearings on his requests for expert psychiatric assistance, the prosecutor became privy to defense strategies and to potential weaknesses in the defense's case.[29] Specifically, he asserts that his attorneys

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[28] We recently decided in Hicks v. Head, 333 F.3d 1280, 1287 (11th Cir.2003), that *Ake* errors are subject to harmless error analysis. Our opinion dealt with the trial court's denial of psychiatric assistance, rather than with its failure to conduct ex pane hearings on requests for such assistance. We need not decide whether our opinion in Hicks applies with equal force to the latter issue. Rather, we need only determine whether the Georgia Supreme Court failed to conform to clear United States Supreme Court precedent existing at the time of its decision.

[29] Hightower also notes that, because the trial judge failed to conduct ex parte hearings, the prosecutor gained the ability to contest his attorneys'

were forced to disclose that Dr. Moore had "declared himself unqualified" to offer a diagnosis, and were required to "provide an accounting" of the funds they had spent in his defense. The record betrays these assertions. Counsel never revealed that Dr. Moore was "unqualified"; they merely told the court at the February 9, 1988 hearing that Dr. Moore "advised [them] that [they] really needed someone who was an expert in family violence." This mirrors the representation they made in their motion of February 8, 1988, which they served upon the prosecutor."[30] Furthermore, the court never demanded at these hearings that the attorneys provide an "accounting" of the funds they had spent. Instead, in support of their requests for additional funds counsel merely volunteered that they had already earmarked their existing funds.[31] We cannot say that Hightower suffered prejudice as a result of this disclosure.

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requests for funds for a psychiatric expert. To the extent he contends that he was in this way prejudiced, we disagree. The trial judge is ultimately responsible for the decision of whether to award expert funds. The prosecutor's arguments only matter insofar as the court accepts them. We address in Part 111.A the question of whether the judge erred in refusing to grant Hightower's requests for funds.

[30] The relevant part of this motion, styled "Motion for Additional Funds to Hire Psychiatrist," reads as follows:

> Defendant's counsels [sic] retained Dr. Archer Moore, of Macon, Georgia, to evaluate the Defendant. On the advise [sic] of Dr. Moore, Defendant's counsels were advised to seek a psychologist or psychiatrist who had extensive experience in dealing with family violence to evaluate the Defendant.

[31] At the close of the February 9, 1988 hearing, the judge asked, "How much money did I give you to start to spend at your discretion?" Defense counsel answered:

To maintain absolute secrecy, Hightower's attorneys could have filed their *Ake* motions under seal and requested that they be reviewed *in camera*.[32] But as the matter stands before us, given our narrow scope of review under 28 U.S.C. § 2254(d), there is no basis upon which to upset the decision of the Georgia Supreme Court. We therefore proceed to a discussion of Hightower's remaining claims.

> We have $5000–$5750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had—we have hired a jury specialist and we have hired a special investigator and that will wipe out all of that money.

Without further argument from either party, the court denied the motion for additional funds. Thus, the court at this hearing merely asked for a reminder of the total sum it had already granted to the defense, rather than an accounting of how the money had been spent. Defense counsel of their own accord stated that they had already committed all of their funds, but they did not itemize their commitments.

At the March 9, 1988 hearing, defense counsel, in presenting their motion for a continuance, told the court that they had spent $450 of the $750 it had granted them for a psychiatric expert. (In fact, counsel had spent $440, not $450.) This disclosure revealed nothing more than what was stated in the court's order of November 25, 1987, which authorized payment for Dr. Moore's services.

At the April 15, 1988 hearing, defense counsel, in their lengthy oral statement to the court, noted that they had received defense funds totaling $5,750. They did not discuss how they had spent that money. Although the clear implication was that they would certainly exhaust this sum, counsel had already said as much at the February 9 hearing. More important, counsel offered this statement at their own behest. The court made no request that they account for the funds they had spent.

[32] Hightower does not contend that his attorneys were ineffective for failing to do so.

IV.

Hightower next claims that the prosecutor used his peremptory strikes during jury selection in a racially discriminatory manner, in contravention of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Georgia Supreme Court rejected each of his Batson claims on direct appeal. *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989). Thus, our review is again limited by 28 U.S.C. § 2254(d). We find this claim to be without merit.

A.

We begin our analysis of this claim by describing the process by which the jury was selected. Voir dire was conducted on Thursday, April 28, and Friday, April 29, 1988. The court summoned a total of seventy-three venirepersons for Hightower's case, but had them appear in three groups: one on Thursday morning, one on Thursday afternoon, and one on Friday morning. The court began the voir dire process by first assembling each group in the courtroom en masse. After it made introductory remarks to the group, the court gave some preliminary instructions and administered oaths.[33] The court then delegated to the prosecutor the duty of propounding the "statutory voir dire" questions specified by Georgia law.[34] After ensuring that the

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[33] The oaths obligated the venirepersons to tell the truth under penalty of perjury to the questions put to them.

[34] O.C.G.A. § 15-12-164 requires that all venirepersons be asked 4 specific questions. These are: (1) "Have you, for any reason, formed or expressed any opinion in regard to the guilt or innocence of the accused?"; (2) "Have you any prejudice or bias resting on your mind either for or against the accused?"; (3) "Is your mind perfectly impartial

entire group was statutorily qualified, the court directed the clerk to call the venirepersons to the jury box twelve at a time for further questioning by the parties."[35] They were called in the same order as they were called when the clerk took the roll after they had reported for jury duty."[36]

Before the parties examined those in the jury box, the court asked them to state their names, addresses, workplaces, and their spouses' names and workplaces. The prosecutor and defense counsel then proceeded with their questioning. After counsel finished, the court permitted the parties to question individually and out of the presence of all other venirepersons anyone whose views on the death penalty

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between the state and the accused?"; and (4) "Are you conscientiously opposed to capital punishment?" The prosecutor asked a form of these questions to each group en masse, rather than to each individual venireperson. Under Georgia law, the trial judge may give the prosecutor the duty of asking the statutory voir dire questions. *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30, 35-36 (1974). It was altogether proper under Georgia law to ask these questions to each group of venirepersons en masse, rather than individually or in panels of twelve. *Ivester v. State*, 252 Ga. 333, 313 S.E.2d 674, 676 (1984).

[35] O.C.G.A. § 15-12-131 provides that "it shall be the duty of the court, upon the request of either party, to place the jurors in the jury box in panels of 12 at a time, so as to facilitate their examination by counsel." This enables counsel to make an informed decision in exercising peremptory challenges and in obtaining grounds for a challenge for cause. O.C.G.A. § 15-12-133 provides that "[i]n all criminal cases[,] both the state and the defendant shall have the right to an individual examination of each juror from which the jury is to be selected prior to interposing a challenge."

[36] Since the venirepersons were called into the jury box in panels of 12, there always remained a group of venirepersons left over from the larger group assembled en masse. It appears that those left over remained in the courtroom and observed the parties' voir dire of the 12-person panels.

appeared (to the parties) to be constitutionally problematic.[37] This process was repeated throughout the day on Thursday and through the early afternoon on Friday. In the end, the parties examined on voir dire six panels, five consisting of twelve persons, and one consisting of thirteen.[38]

The court entertained challenges for cause in two ways. The court heard challenges to those who were questioned individually and out of the presence of all other venirepersons immediately after each was examined. The prosecutor challenged four, and the court excused them. Defense counsel challenged one venireperson, to no avail. The court handled the remaining challenges for cause following the parties' examination of the respective twelve-person panels. The court did so in open court and in the presence of the entire venire, while the panel was in the jury box. Those excused promptly left the courtroom.

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[37] Under Georgia law, "[t]he [trial] court has discretion in determining whether or not sequestered examination should be granted in a particular case." *Ivester*, 313 S.E.2d at 675. At a hearing held on the eve of trial, April 27, defense counsel presented evidence in support of a motion for individual and sequestered voir dire. The court denied this motion as to the venire as a whole, but said that it would permit individual and sequestered voir dire of those who (1) expressed views on the death penalty sufficient to raise a question as to their qualification for service on the petit jury, or (2) stated that they had previously heard about the case.

Before counsel conducted their individual, sequestered voir dire of a panel member, the court cleared the courtroom of the rest of the venire, including those on the panel whom the parties expressed no desire to question individually and under sequestration.

[38] The court sat 13 venirepersons on the sixth panel to accommodate all venirepersons who remained at that point.

Fifty-nine venirepersons were qualified for service on the petit jury." These qualified jurors assembled in the courtroom on Friday, April 29, at 4 P.M.[39] The court informed them that the parties would choose the petit jury the following Monday, May 2, at 9 A.M. It asked them all to return to the courtroom at that time, prepared to serve on the petit jury for up to three days, if necessary.[40]

On Monday, May 2, the parties selected the petit jury from the fifty-nine qualified jurors. Defense counsel had twenty peremptory strikes, and the prosecutor ten.[41] The clerk called the names of the jurors individually, in the order in which they had been called (and ushered into the jury box in the panels of twelve) during voir dire. Each prospective juror was first placed upon the prosecutor, who either excused (by means of a peremptory strike) or accepted him. Jurors accepted by the prosecutor were placed upon defense counsel, and if accepted by them, were empaneled.[42] This

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[39] O.C.G.A. § 15-12-160 provides that "in any case in which the state announces its intention to seek the death penalty, the court shall have impaneled 42 jurors from which the defense and state may strike jurors." Thus, more jurors were qualified in this case than Georgia law requires.

[40] Once selected, the jury was sequestered for the duration of the trial.

[41] O.C.G.A. § 15-12-165 provides that "in any case in which the state announces its intention to seek the death penalty, the person indicted for the crime may peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused."

[42] O.C.G.A. § 15-12-166 provides that "[Of a juror is found competent and is not challenged peremptorily by the state, he shall be put upon the accused. Unless he is challenged peremptorily by the accused, the juror shall be sworn to try the case."

process continued until the full petit jury of twelve was chosen.'[43]

The parties then selected two alternate jurors."[44] As to these, defense counsel had four peremptory strikes, and the prosecutor had two.[45] The clerk called the prospective alternate jurors from the same list as before, beginning with qualified juror number forty-three.

In the selection of the jury of twelve, the prosecutor used seven of his ten peremptory strikes, six against African–Americans. In the selection of the alternates, he used both of his strikes, one against an African–American. Immediately after each African–American was struck, defense counsel noted the juror's race for the record and informed the court that they wished to lodge a Batson objection. The court stated that it would consider counsel's objection after the parties had exercised their peremptory challenges and a jury of twelve and two alternates had been selected (but not sworn). When this was done, the court sent the jurors to the jury room, instructing them not to discuss the case, and directed the remaining qualified jurors to sit in the hallway outside of the courtroom.

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[43] Of the 12 jurors who were empaneled, 9 were white and 3 were black.

[44] O.C.G.A. § 15-12-168 permits a trial court to seat "one or more" alternate jurors in any felony trial that "is likely to be a protracted one."

[45] O.C.G.A. § 15-12-169 provides that "[t]he state shall be entitled to as many peremptory challenges to alternate jurors as there are alternate jurors called," and that "[t]he defendant shall be entitled to additional peremptory challenges in an amount twice greater than the additional peremptory challenges of the state."

Defense counsel then made their objections. Noting that Hightower was African–American, they contended that they had established a prima facie *Batson* violation because the prosecutor had purposefully struck members of Hightower's race on account of their race. In support of their claim that the prosecutor's conduct gave rise to an inference of racial discrimination, counsel advanced two lines of argument. First, they pointed out that in selecting the jury of twelve, the prosecutor used six of his seven strikes to exclude African–Americans. Second, they represented that the prosecutor had "in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels." Counsel presented a newspaper article about *State v. Amadeo*, a case which, they claimed, "arose out of a memo which has been attributed to Mr. Briley," the prosecutor, and which detailed "a purpose and a plan" to limit the number of African–Americans serving on grand juries.[46] Taken as a whole, counsel claimed, these facts were sufficient proof that the prosecutor had discriminated.

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[46] Roughly 1 month after Hightower's trial, the Supreme Court handed down its decision in *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). The Court held that the petitioner in that case had "established cause for his failure to raise in the state trial court a constitutional challenge to the composition" of his grand and petit juries. Id. at 216-17, 108 S.Ct. at 1774. Specifically, the Court noted that while the petitioner was pursuing a direct appeal in state court, an "independent civil action in federal court [had] brought to light a scheme" initiated by the Putnam County District Attorney to "underrepresent black people and women on the master jury lists." *Id.* at 217, 108 S.Ct. at 1774. The Court in its opinion did not provide the names of the individuals in the DA's office who were responsible for creating the memorandum that expressed this scheme. But some 3 years later, in *Horton v. Zant*, 941 F.2d 1449, 1455-56 (11th Cir.1991), we noted that Hightower's prosecutor, Joseph Briley, had admitted to being the author of the memorandum.

The prosecutor denied any attempt to "stack the jury" racially. The court nonetheless required him to give a reason for each of his strikes of African–Americans.[47] We recount his responses here.

Ricky Thomas. The prosecutor stated that Mr. Thomas's father had been convicted for killing Mr. Thomas's mother, but had later returned home to raise his children. The prosecutor feared that Mr. Thomas would "identify" the instant case with his father's. Specifically, the prosecutor felt that Mr. Thomas would give undue thought to "what his father has meant to him since he [came] home," and would presumably be lenient with Hightower as a result.

Lucious Boswell. The prosecutor stated that Mr. Boswell (1) was the brother of the wife of Walter Davis, whom the State had prosecuted for cocaine trafficking and RICO violations, and (2) had indicated that a convicted murderer should "work [his punishment] out in prison," rather than suffer a death sentence.

Mattie Pearl Harris. The prosecutor stated that Ms. Harris (1) "expressed uncertainty" about her willingness to vote for a death sentence, (2) had a son who had been imprisoned frequently, (3) had a daughter who had served a drug-related prison sentence, and (4) had been forced to care for her daughter's children during the latter's prison sentence.

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[47] The court required the prosecutor to explain why he struck an African—American in selecting the 2 alternate jurors even though defense counsel, in articulating their Batson objections, said nothing about the prosecutor's exercise of that strike. In Hightower's brief to us, the prosecutor's striking of this proposed alternate juror does not appear to be part of Hightower's Batson claim.

Norman Jonathan Mack. The prosecutor stated that Mr. Mack had "contradicted himself on the death penalty" during voir dire, once stating that he was "conscientiously opposed," and later softening that stance. The prosecutor felt he could not determine with sufficient certainty the scenarios in which Mr. Mack would be inclined to vote for a death sentence.

Thelma Butler. The prosecutor stated that Ms. Butler was the sister of the wife of Gerald Veasley, whom he had prosecuted to a conviction for aggravated battery.

Emerson Davis, Jr. The prosecutor stated that Mr. Davis had appeared "somewhat [more] opposed to the death penalty" than other prospective jurors.

Lynette Davis (prospective alternate). The prosecutor stated that Ms. Davis (1) had an uncle whom the prosecutor's office had recently convicted for burglary, and (2) was lukewarm on the death penalty.

After this, the court ruled. First, it declined to admit into evidence the newspaper article that defense counsel had submitted in support of their motion. Second, the court ruled that counsel had failed to make a prima facie case of discrimination, and alternatively, that the prosecutor had "presented an articulable, nonrace related reason for striking" each prospective black juror, thereby defeating the claim of discrimination.

B.

[9, 10] In Batson, the Supreme Court held that the State, in the person of the prosecutor, violates the Equal Protection Clause of the Fourteenth Amendment by striking jurors peremptorily on account of their race. 476 U.S. at 89,

106 S.Ct. at 1719. The Court established the mechanism for proving such violations. To make a prima facie case of discrimination,

> the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 106 S.Ct. at 1723 (citation and marks omitted). The trial judge "should consider all relevant circumstances" in deciding whether the defendant has made a prima facie case. Id. at 96-97, 106 S.Ct. at 1723.

[11-13] After the defendant has made a prima facie case, the state must "come forward with a neutral explanation for challenging black jurors." *Id.* at 97, 106 S.Ct. at 1723. The Court has not stated with specificity what sort of explanation will suffice. While the prosecutor may not strike a juror simply on the assumption that "jurors of the defendant's race ... would be partial to the defendant because of their shared race," he is not required to give an explanation that "rise[s] to the level justifying exercise of a challenge for cause." *Id.* Finally, the judge must decide

whether the prosecutor purposefully discriminated against jurors on account of their race through the use of peremptory strikes. *Id.* at 98, 106 S.Ct. at 1724. The defendant carries the ultimate burden of persuasion on this issue. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.E d.2d 834 (1995).

With these principles as background, the Georgia Supreme Court on direct appeal rejected Hightower's *Batson* claim. "Even assuming [that Hightower] made out a prima facie case" of discrimination, the court held, the trial judge "was not clearly erroneous" in finding "that the prosecutor had articulated legitimate nonracial reasons for his challenges," and that the prosecutor had not in fact discriminated. *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989). Given our constraints under 28 U.S.C. § 2254, we find no basis upon which to disturb the supreme court's judgment.

[14] We will assume for purposes of argument (as the supreme court did) that Hightower established a prima facie case of discrimination, thereby satisfying *Batson*'s first step.[48] We proceed to the second step of the *Batson* analysis

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[48] We note that the courts that have decided this question have taken different approaches. The trial court, as we state in Part IV.A, held that Hightower failed to make a prima facie case, but that in any event, the prosecutor's race-neutral explanations for his strikes were sufficient to prevent Hightower from carrying his ultimate burden of persuasion. On direct appeal, the supreme court assumed without deciding that Hightower had made a prima facie case, but found no error in the trial judge's ultimate findings that the prosecutor (1) stated legitimate reasons for his strikes, and (2) had not discriminated. *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989). The district court agreed with the trial judge that Hightower had failed to establish a prima facie case, and thus disposed of the claim without discussing the second or third steps of the Batson analysis. The district court's approach therefore differed from that taken by the supreme court.

to consider whether the prosecutor met his burden of production. The Supreme Court has held that *Batson*'s "second step ... does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771 (citation, marks and brackets omitted). Based upon our review of the record, we cannot say that the Georgia courts erred in finding that the prosecutor satisfied this minimal burden of production. The prosecutor gave specific, nonracial reasons for each of his strikes of African–Americans: some struck jurors were related to persons he had prosecuted or convicted, while others appeared to him to be uncomfortable with rendering a death sentence. Such explanations fall well within the boundaries set by *Batson* and its progeny. *Compare Purkett*, 514 U.S. at 769, 115 S.Ct. at 1771 (holding that the prosecutor satisfied his burden of production merely by expressing his discomfort with the struck black juror's long, unkempt hair, mustache, and beard), with *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (holding that the prosecutor failed to satisfy his burden of production when he stated that he struck a black juror because he "just got a feeling about him").

[15] Proceeding to the third and final step of the Batson analysis, we accept the finding of the Georgia courts

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Mindful of our role in habeas proceedings, we focus our analysis upon the correctness of the supreme court's judgment. That court assumed that Hightower had made out a prima facie case, but denied his claim nonetheless. Our task is to consider whether this judgment "was contrary to, or an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

that Hightower failed to "establish[] purposeful discrimination." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. Our judgment is informed in great part by our recognition of the trial court's superior position to observe the prosecutor's "credibility" and "demeanor," factors that bear strongly upon the ultimate question of whether the prosecutor discriminated. *Miller–El v. Cockrell*, 537 U.S. 322, 338-39, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003); *see Eagle v. Linahan*, 279 F.3d 926, 941 (11th Cir.2001) ("[R]eviewing [a *Batson*] claim ... require[s] us to look over the trial court's shoulder, reconstructing the circumstances surrounding the voir dire of the venire persons and the Batson hearing from the cold record, to decide whether the court correctly determined that the defendant had not raised an inference that the prosecution used its peremptory challenges to remove jurors on account of their race."). The Batson Court itself acknowledged that a trial court's findings on the question of discrimination "turn on evaluation of credibility," and require "great deference" on review. 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

Hightower urges us to give minimal deference to the trial judge's findings. According to Hightower, (1) the prosecutor failed to offer any evidence to support his bare assertions that he had prosecuted the relatives of the black jurors he struck; (2) the trial judge failed to demand that the prosecutor go back and question the black jurors he had struck to see if they could be impartial in spite of their relatives' criminal backgrounds; and (3) the prosecutor did not strike white jurors who were as lukewarm on the death penalty as the black jurors he struck. We dismiss the first two contentions out of hand. The prosecutor satisfied his burden of production merely by stating nonracial reasons for his strikes. As the Supreme Court has recognized, "[i]t is not until the third step that the persuasiveness of the

[prosecutor's stated reasons] becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771 (second emphasis added). Hightower never provided the court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors. The judge was therefore free to accept the prosecutor's stated reasons at face value. Furthermore, he had no duty compel the prosecutor to verify by means of extended voir dire that the black jurors he struck would indeed have been partial to Hightower because of their relatives' criminal backgrounds. *Cf. Batson*, 476 U.S. at 97, 106 S.Ct. at 1723 ("[T]he prosecutor's explanation [for striking black jurors] need not rise to the level justifying exercise of a challenge for cause.").

Hightower's third contention is also fruitless. It is extraordinarily difficult upon the basis of the cold record to compare different jurors' predispositions toward the death penalty. Because such determinations turn largely on observable "credibility," *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 855, 83 L.Ed.2d 841 (1985), the trial court's judgment is entitled to great deference. *See id.* (holding that a finding of juror bias is a factual matter, reviewed as such under 28 U.S.C. § 2254); *United States v. Alston*, 895 F.2d 1362, 1367 n. 5 (11th Cir.1990) ("It is of course true that comparing the attributes of the black and white venirepersons will aid the trier of fact and a reviewing court in determining whether the asserted reasons are pretextual or not. The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared, however, and often require an evaluation of the degree to which the prospective juror manifests the stated attribute."). Given our narrow scope of review, we cannot

say that the trial judge committed constitutional error in this regard.

In the end, the court was under a duty to weigh all evidence placed before it on the question of whether the prosecutor discriminated. Defense counsel rested their claim upon two main evidentiary bases. First, of the seven strikes the prosecutor used, six were against African–Americans. Second, although the Supreme Court had not yet issued its ruling in *Amadeo*, and we had not yet issued ours in *Horton*, controversy existed over the prosecutor's alleged role in a scheme to minimize the representation of minorities on local juries. On the other hand, militating against a finding of discrimination were the prosecutor's uncontested, specific, and race-neutral reasons for striking each black juror. It appears from the record that the court considered both sides of the question and found that the prosecutor had sufficiently rebutted Hightower's allegation of discrimination. Thus, the *Batson* mechanism, which is necessarily deferential to trial court findings, operated properly in this case. *See Miller–El*, 537 U.S. at 339, 123 S.Ct. at 1040 ("[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

We are mindful of the harshness with which we criticized Briley in Horton for his past discriminatory practices. We recognize that these past practices are relevant to his discriminatory intent in the case at hand. *See Horton*, 941 F.2d at 1455. But our task is to determine, in consideration of "all relevant circumstances," *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723 (emphasis added), and given our constraints under 28 U.S.C. § 2254, whether the state court judgment in this case runs afoul of federal law. We cannot say that it does.

V.

[16] Hightower contends that the trial judge violated his federal constitutional right to an impartial jury by allowing jurors to serve who were impermissibly predisposed toward a death sentence. We find this claim to be procedurally defaulted.'[49]

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[49] The district court also found procedural default. Our reasoning differs, however. In his present appeal, in the district court, and in the state habeas court, Hightower has framed this claim in essentially the same way. As we discuss in the text, he has argued that the trial judge used the wrong legal standard for excusing jurors for cause based upon their death penalty views—in other words, that the judge used the obsolete Witherspoon "automatic" standard, rather than the proper Adams-Witt "substantial impairment" standard. Hightower has furthermore contended that he was prejudiced by this recurring error, as it resulted in the seating of death-biased jurors Paul Jensen and Rufus Little.

The district court held that Hightower's claim, so stated, was materially different from the one he raised on direct appeal to the Georgia Supreme Court. According to the district court, Hightower claimed on direct appeal that the trial judge erred under Witherspoon by failing to excuse Jensen and Little. Put another way, Hightower claimed a Witherspoon error on direct appeal, but claimed at all subsequent proceedings that Witherspoon wasn't the proper standard to use in the first place. The district court essentially found that Hightower procedurally defaulted his present claim by failing to have framed it in the same way on direct appeal.

We part company with the district court's opinion in 2 respects. First, the district court was incorrect in stating that Hightower raised claims on direct appeal regarding Jensen and Little—in fact, as we go on to explain, he did not. Second, the district court paid undue attention to the misguided way in which Hightower has presented his claim. The crux of Hightower's claim must simply be *that jurors Jensen and Little were unconstitutionally permitted to serve*. As we discuss in the text, the relevant cases, *Witherspoon*, *Adams*, and *Witt*, merely provide the

In *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968), the Supreme Court held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[50] Later, in *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), the Court refined this standard, holding that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The

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standard under which juror-specific claims of Hightower's type are examined.

[50] In Witherspoon, the petitioner claimed that the trial court unconstitutionally excluded jurors opposed to a death sentence. Hightower, on the other hand, claims that the trial court unconstitutionally failed to exclude jurors predisposed toward a death sentence. The test announced in *Adams* and *Witt* appears to emasculate any legal distinction between these 2 types of cases. *See* discussion infra; *Ross v. Oklahoma*, 487 U.S. 81, 85-86, 108 S.Ct. 2273, 2276-77, 101 L.Ed.2d 80 (1988) (accepting under the *Witt* framework the state's concession that the trial court should have excused a juror for cause because of his bias in favor of a death sentence, but holding that such error was harmless because the petitioner had eliminated this juror with a peremptory challenge). Nonetheless, claims of Hightower's type are still often described as "reverse-*Witherspoon*" claims, perhaps owing to language the Supreme Court has itself employed. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 731, 112 S.Ct. 2222, 2230-31, 119 L.Ed.2d 492 (1992) ("We have also come to recognize that the principles first propounded in *Witherspoon v. Illinois*, the reverse of which are at issue here, demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting.") (emphasis added) (citation omitted). Purely for conceptual purposes, we too use the terms "*Witherspoon*" and "reverse-*Witherspoon*" in referring to Hightower's claims.

Court's opinion in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), made clear that the *Adams* "substantial impairment" test displaced Witherspoon as governing law.

Hightower now claims that two persons who served on his jury, Paul Jensen and Rufus Little, were unqualified to serve under the *Adams-Witt* standard. This claim differs materially from the one he raised on direct appeal to the Georgia Supreme Court. Before that court, Hightower in his brief enumerated the following relevant errors:

> 16. The trial court erred in refusing to excuse for cause juror Chilton, who stated unequivocally that if a person was convicted of killing three (3) people, a life sentence was not severe enough and "he ought to get the death penalty."
>
> 17. The trial court erred in refusing to excuse for cause juror Thompson who stated that a life sentence would not be adequate penalty if the accused was convicted of voluntary manslaughter.
>
> 18. The trial court erred in excusing for cause juror Ponder on the ground that she was opposed to the death penalty in that said juror testified that she would consider the death penalty.
>
> 19. The trial court erred in excusing for cause jurors Ponder, Stewart, and Bailey in that to automatically excuse all jurors opposed to the death penalty denied Defendant his constitutional right to be tried by a jury of his peers.

20. The trial court erred in refusing to excuse for cause juror Sheila Allgood who stated unequivocally that she would automatically vote for the death penalty if Defendant were convicted of three murders.

21. The trial court erred in refusing to excuse for cause juror Ruth Allgood on the ground that she was opposed to the death penalty in that said juror testified that she would consider the death penalty.

Thus, Hightower on direct appeal raised numerous *Witherspoon* and reverse-*Witherspoon* claims, but none as to jurors Jensen or Little, those whom he presently contends were unqualified to serve. The relevance of this omission is manifest. *Witherspoon* claims, dependent as they are upon individual predispositions, are juror-specific. Having failed to present claims on direct appeal as to Jensen and Little, Hightower procedurally defaulted such claims as a matter of state law.[51] *See Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754, 755 (1985) (holding that "a failure to make timely

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[51] 51. Before the state habeas court, Hightower presented the same *Witherspoon* claims (those regarding Jensen and Little) as he presents now. The state habeas court did not address these specific claims in its order denying Hightower's petition, however. Instead, that court addressed a distinct *Witherspoon*-type claim that is not before us—it held that Hightower procedurally defaulted his claim that the trial judge erred by permitting the prosecutor to question the members of the venire on their death penalty views.

In the brief supporting his application for a certificate of probable cause to appeal to the Georgia Supreme Court, Hightower claimed that the habeas court erred by failing to address his Witherspoon claims as to Jensen and Little. The supreme court, evidently unmoved, summarily denied the application.

objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus," absent a showing of cause and prejudice or "a miscarriage of justice where there has been a substantial denial of constitutional rights"). Because he has not shown cause for the default and prejudice resulting therefrom,'[52] *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977), or that a fundamental miscarriage of justice would otherwise result, *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), Hightower's *Witherspoon* claims fail.

VI.

We turn finally to Hightower's claims of ineffective assistance of counsel.'[53] Hightower contends that his attorneys committed various errors at both phases of his trial and on direct appeal.

The governing standard is that of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must

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52 Although Hightower presents a *Witherspoon*-based claim of ineffective assistance of counsel, we reject it in Part VI.

53 We affirm without further discussion the district court's rejection of the following 2 claims of ineffective assistance: (1) that trial counsel failed fully to investigate Hightower's case, develop mitigating evidence, and seek correct jury instructions; (2) that trial counsel distanced themselves from Hightower in front of the jury.

> show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Counsel's performance is constitutionally "deficient" when it "[falls] below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. We must avoid all temptation to "second-guess" counsel's decisions as to trial strategy. *Id.* at 689, 104 S.Ct. at 2065. Instead, we are to examine "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066.

To establish prejudice, Hightower "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. Put another way, he must establish that counsel's errors "undermine confidence in the outcome" of the case.[54] *Id.*

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[54] The Strickland Court articulated different standards for challenges to convictions and sentences:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence ... the question is whether there is a reason able probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have

[17] Ineffectiveness of counsel is a mixed question of law and fact. *Id.* at 698, 104 S.Ct. at 2070. Thus, we review these claims *de novo*. *Chandler v. United States*, 218 F.3d 1305, 1312 (11th Cir.2000).

A.

[18] Hightower first argues that his counsel failed to maintain a coherent defense theory.'[55] We find no basis upon which to grant relief here.

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concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 695, 104 S.Ct. at 2068-69. Although Hightower claims that his attorneys were ineffective at both phases of his trial and on direct appeal, he does not clearly differentiate between errors that affected the guilt determinations and errors that affected the sentences. This differentiation is of no consequence, as we reject each of Hightower's claims of ineffective assistance as to both phases of his trial and as to his direct appeal.

[55] Relatedly, Hightower claims that trial counsel were ineffective for failing to present the testimony of a "competent" psychiatrist.

> In Part III, we hold that Hightower was not entitled under Ake to the assistance of a psychiatrist, but that in the alternative, even if he was so entitled, trial counsel received funds they could have used for a psychiatric expert. Hightower's ineffective assistance claim depends upon the second alternative. He states the issue succinctly in a footnote in his brief: "If the funds provided by the state court were adequate, then trial counsel should have spent them to hire the qualified psychiatrist they knew was crucial to their defense." Essentially, Hightower challenges the way in which counsel spent the $5,750 in defense funds the court granted.
>
> We conclude that Hightower has failed to establish *Strickland* deficiency in counsel's performance. Apart from blanket assertions that counsel should have spent some money

Counsel testified at the hearing before the state habeas court that their strategy was to save Hightower's life, rather than to seek an acquittal. This was a reasonable strategic choice, given that Hightower confessed to the murders on the same day they occurred. Counsel only pursued this sentence-focused strategy after discussing it with Hightower and gaining his approval. Hightower has failed to articulate any concrete attorney error that prejudiced his defense.[56] This claim must therefore fail.

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on a psychiatrist, he gives no specific indication as to how they should have acted differently. He does not specify, for example, (1) how much counsel should have used for a "competent" psychiatrist; (2) whose services counsel should have declined to employ in order to retain a "competent" psychiatrist, e.g., the investigator, the jury specialist, or Dr. Albrecht, all of whom were paid out of the provided funds; or (3) whether counsel should have hired a psychiatrist in addition to, or instead of, Drs. Moore and Albrecht, the psychologists who testified at trial. Because he has failed to demonstrate with specificity how counsel erred in spending the funds, Hightower essentially asks us, in direct contravention of Strickland, to apply the benefit of hindsight to scrutinize counsel's spending decisions. 466 U.S. at 689, 104 S.Ct. at 2065. This we will not do.

[56] Hightower contends that his attorneys prejudicially altered their theory of defense during the course of the trial. He points to the fact that counsel accepted a "guilty, but mentally ill" instruction at the guilt phase charge conference after initially opposing such an instruction. But we cannot see how Hightower suffered prejudice in this regard. Reasonably believing that a "not guilty" verdict was unlikely, counsel evidently felt that it was to Hightower's benefit for the jury to have an alternative to straight "guilty" verdicts. That the jury did not select this alternative is immaterial to a claim of ineffective assistance of counsel.

We must clarify that this ineffective assistance claim is wholly separate from a claim that Hightower raised in the state habeas court and the district court. Before those courts, he claimed that the trial judge erred by failing to give to the jury the complete "guilty, but mentally ill"

B.

Hightower next claims that his attorneys were ineffective at trial for failing to challenge for cause or peremptorily strike two jurors who, in his view, appeared predisposed toward a death sentence.[57] He also contends that defense counsel were ineffective on direct appeal for failing to enumerate as error the court's seating of these jurors. The district court found that even though counsel may have been deficient, Hightower failed to establish prejudice resulting therefrom. We agree.

[19] We first consider his claim as to juror Paul Jensen. The relevant portion of defense counsel's voir dire of

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instruction required by O.C.G.A. § 17-7-131(b)(3)(B). Both courts found this claim procedurally defaulted. The question before us is merely whether trial counsel were ineffective in not objecting to a "guilty, but mentally ill" instruction in the first instance. We conclude that they were not. As to the next question, i.e., whether the trial judge erred in giving an improper "guilty, but mentally ill" instruction, Hightower has not presented the question to us, and we therefore do not address it.

[57] Hightower also contends that counsel were ineffective at trial and on direct appeal because of their ignorance of the correct standard, i.e., *Adams-Witt* instead of *Wainwright*. *See* Part V. So stated, this claim misses the mark. Hightower cannot prevail on a claim of ineffective assistance without showing that he suffered prejudice. As to a reverse-*Witherspoon*-based claim of ineffective assistance, Hightower must show that counsel's ignorance of the correct standard resulted in the seating of jurors who were unconstitutionally biased in favor of death. Practically speaking, Hightower must show that because of their ignorance, defense counsel failed properly to deal with these unacceptable jurors, whether by neglecting to (1) challenge them for cause, (2) strike them peremptorily, or (3) claim on direct appeal that the trial judge erred by seating them. As with Hightower's main *Witherspoon* claims, we examine this ineffective assistance claim in a juror-specific manner.

Jensen, i.e., that which revealed his attitude toward a death sentence, reads as follows:

MR. BUICE: Mr. Jensen? Where are you on that? Would the fact that three people died ...?

MR. JENSEN: He's convicted of three murders?

MR. BUICE: Yes.

MR. JENSEN: It would be very—it would determine—it [sic] would have to determine the case—the case would have to determine how I'd feel exactly, but it would be very hard for me not to vote for the death penalty because of three murders.

MR. BUICE: Well, would the fact of three murders, then, tend to close your mind to other considerations?

MR. JENSEN: Right now it would, but it would have to be determined by the severity of the case and what was involved in determining of the three murders.

Counsel challenged Jensen for cause on the grounds that (1) he was a college student whose worry about missed course-work would divert his attention, and (2) he appeared to favor a death sentence if drugs or alcohol had contributed to the commission of the crime. The court rejected the challenge.

We conclude that this brief voir dire exchange provides no basis for relief.[58] Although Jensen suggested that he would favor a death sentence if three murders were

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[58] In support of his claim, Hightower offers no evidence beyond the excerpted portion of Jensen's responses that we reproduce here.

established, he also indicated that he could not form an opinion on the sentences until he heard the evidence. Given the difficulty of reviewing such equivocal answers from the cold record, years after they were uttered, it is obvious why we accord great deference to trial judge determinations of juror bias. *See, e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 429-30, 105 S.Ct. 844, 855, 83 L.Ed.2d 841 (1985) (holding that a trial court's determination of juror bias is a matter of fact, to be reviewed as such under 28 U.S.C. § 2254). The trial judge, in a superior position to observe Jensen's credibility and demeanor, refused to excuse Jensen for bias. We cannot say that Hightower suffered prejudice from counsel's failure to strike Jensen peremptorily or to allege on direct appeal that the court erred in seating him.

We next consider Hightower's claim as to juror Rufus Little. Defense counsel's voir dire of Little proceeded as follows:

MS. GEORGE: ... I am going to again ask the same question and I am going to say this with two questions. If a person has been convicted of murder and the murder of three people, are you strongly in favor, somewhat in favor, or somewhat opposed to the death penalty? ... Okay, Mr. Little?

MR. LITTLE: Strongly for it if it has been proven.

MS. GEORGE: If it's been proven?

MR. LITTLE: Yes.

MS. GEORGE: If there were a conviction of three deaths [sic], three people involved, three people had died, could you vote for a life imprisonment, would that be severe enough punishment for you? ... How about you, Mr. Little?

MR. LITTLE: I would have to hear the case. Three murders, you know, that's cruel, but there may be something out of it to prove without a doubt, well then a life would—I'd have to hear the case.

MS. GEORGE: All right. How about you, Mr. Little? Would you automatically vote for the death penalty if there was a conviction of three people?

MR. LITTLE: If they proved without a doubt he did it.

MS. GEORGE: You would automatically do it?

MR. LITTLE: If they proved without any doubt, based on the circumstances, I would. But it's hard to say until I hear the whole case.

MS. GEORGE: But you did say if the person was convicted beyond a reasonable doubt, you would automatically vote for the death penalty?

MR. LITTLE: Automatically—like I say I would automatically—like I say I would have to hear the case. Like I say I would automatically vote for the

MS. GEORGE: That's all I have Your Honor.

Counsel did not (1) challenge Little for cause, (2) exercise a peremptory strike against him, or (3) claim on direct appeal that it was error to seat him. Again forced to review the cold record to detect bias,[59] we decline to grant relief. In our view, Little's statements during voir dire, in

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[59] 59. Hightower produces no evidence as to Little beyond this excerpt of his examination.

their totality, do not reflect a pro-death sentiment sufficient to establish prejudice. Even as defense counsel sought to pin down his bias, Little continually expressed that he would need to hear the whole case before deciding on the proper punishment. We agree with the district court that Hightower failed to show that Little's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424, 105 S.Ct. at 852.

VII.

We have considered Hightower's claims and find them to be without merit. The judgment of the district court is, accordingly,

AFFIRMED.

WILSON, Circuit Judge, concurring:

I agree with our ultimate conclusion that Hightower has not been successful in presenting a claim under Batson. In this case, we are obliged—and perhaps constrained—to defer to the state courts. This principle, coupled with the fact that the trial court did not have before it any real evidence of Briley's consistent pattern of discriminatory conduct,[1] supports our conclusion today.

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[1] Our opinion notes supra "the harshness with which we criticized Briley in [*Horton v. Zant*, 941 F.2d 1449 (11th Cir.1991)] for his past discriminatory practices." *Supra* at 1035. Specifically, in *Horton*, we noted that Briley penned a memorandum (also mentioned in footnote 46, *supra*) that directed a clerk of court to limit the number of blacks, women, and young people on juries. *See Horton*, 941 F.2d at 1455. We also discussed in Horton a statistician's finding that in capital cases in eight Georgia counties involving black defendants over several years,

However, I am quite concerned with the manner in which the state courts have applied Batson in this case. It appears that they have inappropriately condensed Batson's three-part inquiry into two, thereby risking a serious constitutional error. I write separately to address my concerns, and to stress the importance of adherence to Batson's requirements.

I first repeat the procedure that Batson mandates. First, the defendant must establish a prima facie case of discriminatory intent on the part of the prosecution. *See Batson*, 476 U.S. at 96, 106 S.Ct. 1712. Once a court has determined that a defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *See id.* at 97, 106 S.Ct. 1712. If the state clears this hurdle, the trial court then has the responsibility to determine whether the defendant has established purposeful discrimination. *See id.* at 98, 106 S.Ct. 1712; *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). An analysis of the state courts' opinions in this case raises the question of whether they properly applied *Batson*'s third step.

The Georgia Supreme Court's discussion as to the *Batson* issue is so brief that it is unclear whether that court even reached and resolved *Batson*'s third step at all. The

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Briley used 89.9% of his strikes against black venire members. *See id.* at 1458. In capital cases involving black defendants and white victims, that number jumped to 94.1%. *See id.* The case discussed a number of other similarly shocking statistical and mathematical findings. See generally *id.* at 1457-59. We found that under such odds, "courts cannot make a blind leap of faith that there exists some set of legitimate factors which correlates one-to-one with the race of the venire members." *See id.* at 1458.

Georgia Supreme Court's entire discussion of Hightower's Batson claim is as follows:

> The defendant contends the prosecution was guilty of racial discrimination.... The prosecutor used only seven of his authorized 10 peremptory strikes. He used six of those seven strikes against black prospective jurors. The record shows that at least two black prospective jurors were struck by the defendant after having been accepted by the prosecutor. The prosecutor explained his peremptory challenges. Four of the challenged prospective jurors were closely related to persons convicted of serious felonies. The other two were conscientiously opposed to the death penalty, although not to the extent they were excused for cause. The trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie ease, ... the trial court's determination is not clearly erroneous.

Hightower v. State, 259 Ga. 770, 386 S.E.2d 509, 512 (1989) (citations omitted). The language in the final two sentences quoted above seems to suggest that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the Batson inquiry.[2] However, such a finding only triggers the third

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[2] This interpretation of the Georgia Supreme Court's opinion is buttressed by the fact that the trial court only made explicit determinations with regard to the first two steps. After hearing and approving each of the reasons for the prosecution's strikes, the court stated "I find that the defendants have failed to establish a prima facie

step in the analysis; we regard each step of Batson's inquiry as a prerequisite to the next. *Cf. Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 636 (11th Cir. 2000) ("As [Batson's] framework makes clear, the establishment of a prima facie case is an absolute precondition to further inquiry into the motivation behind the challenged strike.").

Once Hightower established a prima facie case of discrimination (or, once the Georgia Supreme Court assumed that Hightower established a prima facie case of discrimination), the burden shifted to the state to come forward with a neutral explanation for challenging black jurors. *See Bui v. Haley*, 321 F.3d 1304, 1313-14 (11th Cir.2003). Once the state cleared that hurdle, the court then had the responsibility to determine whether Hightower had established purposeful discrimination. *Id.* at 1314. The Georgia Supreme Court appears to have been evaluating not whether Hightower had met his burden of establishing purposeful discrimination, but merely whether the prosecution's proffered reasons for the strikes were race-neutral. The approach taken could inappropriately turn Batson into a test of the sufficiency of the prosecution's reasons for its strikes. An entire additional step, in which the

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case of discrimination on the part of the district attorney. I further find that as to each individual strike, the State has presented an articulable, nonrace related reason for striking the prospective juror." Tr. at 626. As I discuss *infra*, the trial court's threshold finding that Hightower failed to establish a prima facie case was questionable.

Further, it is unclear what the trial court's approach to *Batson* actually was. After improperly failing to find that a prima facie case had been established, the trial court proceeded to *Batson*'s second step—a step that it technically needn't have reached. Then, once it attempted to engage in Batson's full inquiry, it failed by stopping short of Batson's third step.

strength of Hightower's case was weighed against the persuasiveness of the state's proffered reasons for the strikes, appears to be missing from this case.

Moreover, the Georgia Supreme Court's conclusion is questionable in that it found as not clearly erroneous a trial court finding that plainly ran contrary to Supreme Court precedent. The trial court's primary error was in failing to find that Hightower had established a prima facie case of discrimination. The burden on a defendant seeking to establish a prima facie case is not high; he must merely show that "'he is a member of a cognizable racial group'" and that the "relevant circumstances raise an inference" that [the prosecution] has "exercised peremptory challenges to remove from the venire members of [his] race." *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir.1989) (quoting *Batson*, 476 U.S. at 96, 106 S.Ct. 1712).

Obviously, Hightower demonstrated his being a member of a cognizable racial group, and his counsel's argument at trial, coupled with the long odds of six of seven black jurors being struck from the jury, together were sufficient to raise at least an inference of improper conduct. It is difficult to determine what else the trial court could have required of Hightower for the presentation of his prima facie case. In short, the trial court raised the standard set by the Supreme Court. *See Holloway v. Horn*, 355 F.3d 707, 728 (3d Cir.2004) ("The defendant generally meets [his] burden if there is a pattern of strikes or if the prosecutor's questions and statements during voir dire support an inference of discriminatory purpose.").

However, our obligation to defer is great, and while it appears that the Georgia Supreme Court could have engaged in a more thorough inquiry as to Hightower's Batson claim, it has not affirmatively misstated federal law. Our task at

this stage is to review a state court's decision, and not its rationale. *See Wright v. Sec'y for the Dep't of Corrs.*, 278 F.3d 1245, 1255 (11th Cir.2002). Although a state court opinion containing a "conspicuous misapplication of Supreme Court precedent" is not entitled to deference under the AEDPA, "[w]e will not presume that a state court misapplied federal law, and absent indication to the contrary will assume that state courts do understand 'clearly established Federal law ... as determined by the Supreme Court of the United States.'" *Id.* at 1256 n. 3 (quoting 28 U.S.C. § 2254(d)(1)). No such great deviation from federal precedent is present in this case.

Moreover, even if the Georgia Supreme Court had engaged in all three of Batson's required steps, it is incredibly unlikely that the result in this case would have been any different. The burden of persuasion regarding purposeful discrimination never shifted from Hightower. The case he presented on this issue was not particularly strong and was met by ostensibly race-neutral reasons for the state's strikes. We now know quite well of Briley's shameful history of discriminatory conduct, and I question what a better defense could have exposed in this case.[3] Still, after consideration of the record, I am constrained to join in today's decision.

A trial judge's stewardship over the jury selection process is not to be taken lightly. As Justice Powell wrote, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed tocure." *Batson*, 476 U.S. at 85, 106 S.Ct. 1712. With this in mind, I stress the singular

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[3] I note, however, that Hightower's *Batson* claim was not presented in the context of his ineffective assistance of counsel claim.

importance of the trial court's role in Batson's third step. By appearing to evaluate only the race-neutrality of the prosecution's reasons for its strikes and not clearly making a determination as to the entire record, a court runs the risk of virtually guaranteeing victory for the prosecution in every case. Trial judges must be vigilant to ensure that *Batson*'s test does not become a vehicle simply for approving the sufficiency of the prosecution's reasons for its strikes. The potential consequences of anything less are far too great.

IN THE SUPERIOR COURT FOR THE COUNTY
OF BALDWIN
STATE OF GEORGIA
THE STATE
VS.
JOHN W. HIGHTOWER
CASE NUMBER 33747
MURDER, THREE COUNTS
DEATH PENALTY CASE
VOLUME THREE

TRIAL HELD BEFORE HONORABLE WILLIAM A. PRIOR, JR., JUDGE AND A JURY - - - APRIL 28 & 29, 1988 and MAY 2, 3, 4, 1988

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Official Court Reporter
Ocmulgee Judicial Circuit
Post office Box 745

MS. GEORGE: Your Honor, we state our motion that the State has exercised seven pre-emptory strikes in this case. Out of the seven he has . . .

MR. BRILEY: Close that door, please Excuse me.

THE COURT: All right, go ahead with your motion.

MS.. GEORGE: Out of that seven he has used six of those strikes to strike blacks, black males or black women. The Batson v. Kentucky test that the defendant must show any relevant circumstances that raise an inference that the prosecutor excluded jurors on account of their race. We show that he used these pre-emptories to remove members of the defendant's race. The defendant is a member of a cognizable race or group which are blacks. We would also state that Mr. Briley has in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels. We would state that this was the bent of mind and the type of thing that Mr. Briley is doing at this time. He has purposely excluded blacks so that Mr. Hightower will not get a fair and impartial hearing on this case and this matter.

Your Honor, I have here a. copy of the Fulton Daily Reporter which was on Wednesday, March 30, 1988, where we got headlines, Does County. Plan To Discriminate, high court hears jury panel. This was regarding the case of the State vs. Amadeo which has gone up to the Georgia Supreme Court. I will make a quote here from the U.S. Supreme Court Justice John Paul Stevens. "The evidence disclosed is the intentional program of rigging the jury by the prosecutor's office." This arose out of a memo which has been attributed to Mr. Briley stating that there was a purpose and a plan to

have a member number of blacks on the grand jury in Putnam County in order to have it just half the jury criteria for grand jury. We would state, and this was in 19 - - Your Honor may know. You are well acquainted with that case, Your Honor. We would say that this is the same circumstances, the same sort of scheme that Mr. Briley was doing in this particular case. He is purposely using his strikes to provide for just the minimum amount of blacks, absolutely the minimum amount, but what he has done is prevented Mr. Hightower from getting a fair and impartial hearing. We would state that this is in violation of Mr. Hightower's due process rights and it is fundamentally unfair and violates the Eighth Amendment, the Fourteenth Amendment and the applicable articles of the GeorgiaConstitution.

THE COURT: Mr. Briley, I will ask you if you want to respond generally and then we will go through the list one at a time?

MR. BRILEY: Yes, sir, Your Honor, the - - I want it to be noted that the State used a total of seven strikes and that we struck six black prospective jurors, one white prospective juror. In the selection of the alternates we struck one white and one black. Counsel for defense struck - - used a total of seventeen strikes and - - sixteen strikes and struck fourteen whites and two blacks. I guess it would seem that they were attempting to

MS. GEORGE: Your Honor,

MR. BRILEY: Wait a minute, I ain't through. I didn't interrupt you.

MS. GEORGE: You are not through?

MR. BRILEY: No.

THE COURT: He has an opportunity to state his response.

MS. GEORGE: I'm sorry, Your Honor.

MR. BRILEY: I guess it would seem that on the same basis that State was accused that the defendant is attempting to stack the jury, but I don't really believe that, Your Honor. I believe she was attempting, just like the State was, to select the jurors which she believes would be most favorable would most favorably listen to their comments in this case.

Your Honor, insofar as the statements from the Daily Report and the statements from Justice Stevens, I would like to say that I don't know if it is in there or not, but I believe Justice O'Conner asked the defense lawyer in this case, Amadeo's lawyer looked and said, "couldn't it have been that Mr. Briley was trying to get the matter improved and was telling them how few they could put on it, in the jury box." So, Your Honor, it is a matter of which direction you look at this case and Your Honor is perfectly familiar with that case. And insofar as Amadeo is concerned, it didn't arise out of that. That evidence was in a civil case, a voting rights case, in Putnam County and of course, Amadeo's defense was perfectly aware of that and chose not to raise the question. And if the question had been raised, a new jury would have been drawn. But with that in mind, Your Honor, we have not struck any black jurors in this case because they were black. As a matter of fact, we wanted the other two that was struck because we passed them on to counsel in this case.

THE COURT: All right, sir. I will ask you to respond on the jurors individually. My notes indicate State's first strike was Ricky Thomas, black male.

MR. BRILEY: Ricky Thomas, Your Honor?

THE COURT: Yes, sir.

MR. BRILEY: Ricky Thomas, father was convicted for killing his mother when Ricky Thomas was eight years old. He came back after he served whatever time he had to serve, he came back home and raised his children. There's obviously a possibly that Ricky Thomas would identify in this case and compare this case with his father's case and compare what his father has meant to him since he come home. For that reason, Your Honor, we thought that we should get him off.

THE COURT: Mr. Briley, I find that is an articulable reason the State has stated for striking Ricky Thomas and is not race related.

The second State strike accoring to my notes is Lucious Boswell, black male.

MR. BRILEY: Your Honor, the State prosecuted Walter Davis for trafficking in cocaine filed a civil ricoh, condemned his cars and all property, money, c.d's that were in his kids names and this prospective juror is the brother of the wife of Walter Davis. In addition to that in response to the question about whether he thought that someone who had been convicted of killing three people should be sentenced to death, his response was no, I think he ought to be allowed to work it out in prison.

THE COURT: I find the State's reason - -the State has stated an articulable reason for striking Lucious Boswell and the reason is not race related.

My notes indicate the third strike from the State was Mattie Pearl Harris, juror twenty-seven on the original numbering system, black female.

MR. BRILEY: Mattie Pearl Harris expressed uncertainty about her stance on the death penalty. Her son has to be locked up frequently, but she does not want him punished. Her daughter, Belinda Harris was convicted and imprisoned for drugs and has just got out and in addition to that, this lady stated that she has two, two year old twins that she has to take care of at home and she asked to get off for that reason. And these two year olds that she has are the children of Belinda Harris that she has been caring for while Belinda was in prison. She also said that she felt that the fact the defendant had killed three people means he is sick and needs help.

THE COURT: I find that you have stated an articulable reason for striking Mattie Pearl Harris and that reason is not race related.

My notes indicate that your fourth strike was juror number forty on the original numbering system, Norman Jonathan Mack, black male.

MR. BRILEY: Mr. Mack stated - - he contradicted himself on the death penalty. At first he said that he was conscientiously opposed, then upon further questioning said that he was somewhat in favor and then he said that he was conscientiously opposed under some circumstances. And Your Honor, there is no way for us to

explore under what circumstances he was conscientiously opposed.

THE COURT: I find that you have stated an articulable reason for striking Norman Jonathan Mack and that reason is not race related.

My notes indicate that your fifth strike was juror number fifty-one on the original numbering system, Kelly L. Randall, white female, the motion would not go to that juror.

MR. BRILEY: I would like to give that reason, Your Honor, for the record.

THE COURT: All right, sir.

MR. BRILEY: I'll give a reason for everybody I struck. Her uncles was shot and killed by police in Gainesville just before Christmas. I investigated this case and found that the police-man went in under a search warrant as result of information given by an informant. They went into his house, it was the wrong house. This young lady's uncle was in the house. He thought that he was being burglarized. He reached for a shotgun and the Gainesville police shot him and killed him. I felt we could not take her at this time.

THE COURT: I note your reasons for Kelly L. Randall who is a white female.

My notes indicate the State's sixth strike was juror number sixty-one on the original numbering system, Thelma Butler, black female.

MR. BRILEY: Your Honor, approximately twelve years ago I prosecuted Gerald Veasley - - I

prosecuted and convicted Gerald Veasley for shooting a man in the face with a shotgun and convicted him of aggravated battery. He received a twenty year sentence, later reduced to twelve years by the sentence review panel. Yesterday I noticed that Ms. Butler was a little antagonistically hostile. I didn't know last week. I went and checked out if any one knew the reason - - of any reason for the hostility towards my question. It was then that I learned that she was married - - or that she is the sister of the wife of Gerald Veasley.

THE COURT: I find you have stated an articulable reason for striking Thelma Butler and that reason is not race related.

My notes indicate State's seventh strike was juror sixty-seven on the original numbering system, Emerson Davis, Jr., black male.

MR. BRILEY: Mr. Davis said that he was somewhat opposed to the death penalty.

As compared to other people we had on that question about the death penalty, he was undesireable from that point of view.

THE COURT: I find you have stated an articulable reason for striking Emerson Davis, Jr., and that reason is not race related.

My notes indicate no further strikes from the State on the original forty-two member prospective jury panel.

We will move now to the alternates. My notes indicate State's first strike on alternate jurors was juror number ninety on the original numbering system, Gerald

Bonner Smith, white female, or it must have been white male.

MS. GEORGE: Your Honor, it was a female.

THE COURT: Is it female?

MR. BRILEY: Ms. Bonner stated that she was in favor of the death penalty if it fit the crime and she didn't look like she was real sure of it. Her expressions were that she didn't really know how she felt about it.

THE COURT: All right, sir. I note your reasons for striking Ms. Smith who was a white female and therefore the Batson motion would not go to her.

My notes indicate that State's second strike on prospective alternate jurors was juror number ninety-one on the original numbering system, Lynette Davis, black female.

MR. BRILEY: Lynette Davis stated that she was against the death penalty, but felt she could impose it under certain circumstances. Her uncle is now in jail for burglary. We have just convicted him of burglary.

THE COURT: I find you have stated an articulable reason for striking Lynette Davis and that reason is not race related.

That completes State's strikes on both the forty-two member prospective jury panel and the eight member prospective alternate panel. Do you want to respond to any of this, Ms. George?

MS. GEORGE: Yes, Your Honor, basically the general question is to Mr. Briley's first remarks, we, of

course, do not have the burden for explaining under Batson. That is the prosecutor's burden, not ours.

We would like at this time to tender a copy of the Daily Report for the record.

MR. BRILEY: I object to that, Your Honor. It hasn't been established that it is an actual true copy.

THE COURT: I sustain the objection.

MS. GEORGE: That's all, Your Honor.

THE COURT: Okay, ladies and gentlemen, after hearing the defendant's motions under Batson I find that the defendants have failed to establish a prima facie case of discrimination on the part of the district attorney. I further find that as to each individual strike, the State has presented an articulable, nonrace related reason for striking the prospective juror.

Are there any other motions we need to entertain before I call all jurors back into the court room and dismiss those who have not been selected to serve on this jury. Mr. Briley, any further motions?

MR. BRILEY: No, sir.

THE COURT: Ms. George or Mr. Buice?

MR. BUICE: I believe you said that you would entertain certain other motions after that has been done.

THE COURT: Thank you, Mr. Buice.

Would you ask the bailiffs and assist the bailiffs in calling all jurors back into the courtroom, please?

(Whereupon, all prospective jurors who were not selected to serve on this case are asked to comeback into the courtroom at this time and they do return into courtroom.)

THE COURT: Ladies and gentlemen, I am about to dismiss you from further service in this case. I want to thank each of you for your service in this case. I appreciate your cooperation very much. I appreciate you being in the courtroom at the times I asked you to be here. We have at-tempted to hold down any inconveniences. There is some inconvenience, of course, built into our jury system. We have attempted to structure the voir dire in this case so that you did not have to remain in the courtroom during the entire process. Again, I think you very much for your service as jurors. Ms. Mealor will mail you your checks for your three days service. You are now dismissed and free to leave the courtroom.

(Whereupon, all prospective jurors leave courtroom.

PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

Prisoner's Name: **John Washington Hightower**

Prisoner's Name: **EF222841**

Place of Confinement: **Jackson State Prison**
Jackson, Georgia

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

John Washington Hightower, Petitioner,	Civil Action File No. 3:96-CV-97 (DF)
v.	Chief Judge Duross Fitzpatrick
Tony Turpin, Warden, Jackson State Prison, Respondent.	Post-Conviction Proceedings Capital Case

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

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Dated: November 25, 1996

110. The existence of a prima fade case of discrimination shifts the burden to the State to come forward with a neutral explanation for challenging black jurors. *See Cochran v. Herring*, 43 F.3d at 1411. Prosecutor Briley stated his reasons for using an overwhelming majority of his strikes on African-Americans. Given Prosecutor Briley's documented history of improper conduct, *see Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988) (discussing a memorandum written by Prosecutor Briley designed to underrepresent African-Americans, women and all individuals eighteen to twenty-four years old on grand and traverse juries); *Horton v. Zant*, 941 F.2d 1449,1453-60 (11th Cir. 1991) (finding that Prosecutor Briley used peremptory challenges repeatedly to strike African-Americans because of race), the State's explanations for excluding African-American venire members must be examined critically. *Horton*, 941 F.2d at 1457 (finding evidence of previous improper activity by Prosecutor Briley to be relevant to determining intent in that case). The State's reasons for striking the seven black jurors were pretextual:

A. Ms. Thelma Butler

111. To explain why he struck Ms. Butler, an African-American female, from Mr. Hightower's jury, Prosecutor Briley stated:

> [A]pproximately twelve years ago I prosecuted Gerald Veasley ... [H]e received a twenty year sentence later reduced to twelve years by the sentence review panel. [Y]esterday I noticed Ms. Butler was a little antagonistically hostile. .. . I went out and checked if any one knew ... of any reason for the hostility. It was then that I learned that she

> was ... she is the sister of the wife of Gerald Veasley.

(T. 623). Upon examination it becomes clear that this explanation was merely a pretext for discrimination.

112. At no time did Ms. Butler give answers that could remotely be considered "antagonistic." In fact, she indicated that she was not opposed to capital punishment, (T. 342), she could reserve judgment on punishment until the dose of the sentencing phase, (T. 347), she felt people tried for murder are treated too *leniently*, (T. 385), *she was strongly in favor of the death penalty*, {T. 388), and she stated that mitigating circumstances *must be proven before she would consider imposing a life sentence*. (T. 389). Mr. Briley's feeling that Ms. Butler was antagonistic is not enough: Batson makes it clear that a prosecutor's "feelings" about a juror do not satisfy the requirement that the state "give a 'dear and reasonably specific' explanation of his 'legitimate reasons" for exercising challenges. *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (citation omitted).[37]

113. Most important, at least one similarly situated white juror was not struck by the State: ***white juror Michael Anthony Hensler himself had been convicted of voluntary manslaughter by Mr. Briley's office.*** (T. 70).[38] Thus, Mr. Briley's explanation for striking Ms. Butler applied with

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37 Indeed, "'[i]f [such] general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement."'" *Horsley*, 864 F.2d at 1546 (citations omitted).

38 According to Mr. Hensler, he got a full pardon "in '73 or '75." (T. 70).

equal or greater force to a white juror the prosecutor declined to strike.[39] *See, e.g.*, *Stewart*, 65 F.3d at 926 (stating that it is proper for a court to compare the attributes of stricken black jurors with seated white jurors under Batson); *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 944 (1995); Horsley, 864 F.2d at 154446 (same); *United States v. Bennett*, 928 F.2d 1548, 1551 (11th Cir. 1991) (same). The relatively close similarity of Mr. Hensler's crime to that charged of Mr. Hightower (both involved intentional homicides) provides further evidence of purposeful discrimination by Prosecutor Briley. *See United States v. Mathis*, 96 F.3d 1577 (11th Cir. 1996) (considering the similarity of criminal cases).

114. The record offers no support whatsoever for prosecutor Briley's assertions that (a) Mr. Veasley was prosecuted by Mr. Briley and received a twenty year sentence; or (b) that Ms. Butler is the sister of the wife of Mr. Veasley. "[The] inability to point to anything in the record to support the prosecutor's stated rationale ... reveals the transparency of the prosecutor's proffered reason." *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995). *See also Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992) (record provided no evidence whatsoever supporting prosecutor's assertion that juror did not understand standard of proof); *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir.) (record did not support prosecutor's assertions concerning

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39 Additionally, Mr. Hensler was less adamant than ms. Butler on the death penalty. He stated that a life sentence could be a fair, just and proper penalty for murder, (T. 104) and testified that he could "be broad minded" when considering the possibility of a life sentence for a person who had killed three people. (T. 110).

background and alleged lack of education and knowledge), *cert. denied,* 484 U.S. 898 (1987).[40]

115. The prosecutor's failure to question Ms. Butler about her alleged relationship with Mr. Veasley provides even further evidence of the pretextual nature of the justification for striking her. *See United States v. Brown*, 817 F.2d 674, 676 (10th Cir. 1987) (finding a violation of Batson were the prosecutor struck two black jurors without making any "effort [during voir dire] to determine whether his [alleged] concerns were real"). Furthermore, the failure of the record to support Prosecutor Briley's rationale for striking Ms. Butler, as well as other jurors detailed *infra*, refutes any need for this Court to defer to the factual findings of the state court under § 2254.[41]

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40 While Ford and Garrett were decided under the standards announced in Swain v. Alabama, 380 U.S. 202 (1965), the prosecutors in those cases proffered allegedly race-neutral reasons for striking potential jurors, causing the court to analyze the proffered reasons in a manner analogous to Batson, which had already been decided by the United States Supreme Court.

41 The Eighth Circuit commented: "Ordinarily, given the trial court's proximity, we afford great deference to its determination that a peremptory strike was made for race-neutral reasons. ... In this case, however, the record simply offers no support whatsoever for the prosecutor's stated reasons for striking [the jurors.] ... Because the record also fails to support the state trial judge's fact-findings as to [the jurors], these findings are not entitled to the statutory presumption of correctness." *Ford*, 67 F.3d at 169. *See also Garrett*, 815 F.2d at 514.

The fact that *Ford and Garrett* were decided prior to the recent passage of the AEDPA is irrelevant. Even under § 2254(d)(2) of the new amended code, assuming *arguendo* that it applies, a writ of habeas corpus is proper when an adjudication on the merits of a claim in the State court is based on "an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." (emphasis

B. Mr. Norman Mack

116. The prosecutor offered this explanation for striking Norman Mack:

> [H]e contradicted himself on the death penalty. At first he said that he was conscientiously opposed, then upon further questioning said that he was somewhat in favor and then he said that he was conscientiously opposed under some circumstances. And. there is no way for us to explore under what circumstances he is conscientiously opposed.

(T. 621-22). Mr. Briley's explanation is flawed for two reasons.

117. First, Mr. Mack's testimony never wavered. In fact, he was remarkably consistent in his position that he could impose the death penalty. (T. 254-55). Although he stated that he would not automatically vote for the death penalty, (T. 253),[42] he indicated a willingness to impose it. (T. 254-55). He stated that he was "somewhat in favor" of the death penalty, and that it would be an appropriate sentence in some cases. (T. 312). Thus, Mr. Mack's position was that he could only impose the death penalty in

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added). At the very least, § 2254(d)(2) must inform any analysis under § 2254(e)(1) of the amended code. The two provisions would be inconsistent if the federal courts are now supposed to be indifferent to methods of state court factfinding.

42 Of course, any juror who would automatically vote for the death sentence must be stricken for cause. *Morgan v. Illinois*, 504 U.S. 719 (1992); *see supra Claim II.*

certain cases, which is precisely the standard the court should have followed in selecting the jury.[43] *See Ford*, 67 F.3d 162 at 169 (stating in an analogous situation: "We cannot understand how the prosecutor, from this record, could conclude that [the juror] was not strong on the death penalty.").

118. Second, the assertion that there was no way to explore the circumstances in which Mr. Mack would impose a sentence was irrelevant. The only real concern was whether he would be open to a sentence of death in this case. Mr. Mack's testimony made clear that he was prepared to listen to the evidence and that he would determine Mr. Hightower's sentence only after all the testimony had been presented. Mr. Mack stated that he could consider all the evidence, including the fact that Mr. Hightower was an abuser of alcohol and cocaine. (T. 297). Mr. Mack said that alcohol and cocaine use would not dose his mind as to the sentence, (T. 301), and that nothing he had heard would make it difficult for him to sit on the jury in this case. (T. 323). In short, Mr. Mack gave answers consistent with being an outstanding juror.

C. Mr. Emerson Davis

119. Mr. Briley stated that he excused black juror Emerson Davis because he was "somewhat opposed to the death penalty. As compared to other people we had on that question about the death penalty, he was undesirable from that point of view." (T. 624). Mr. Briley's alleged justification was pretextual.

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43 Cf. *supra* Claim H (setting out correct standard for juror excusal).

120. During voir dire, Mr. Davis indicated that he was not opposed to capital punishment (T. 344), he could reserve judgment on sentence until the end of the penalty phase (T. 350), he believed people charged with murder are treated fairly (T. 386), and he could impose a sentence of death after hearing all the evidence. (T. 388). Furthermore, Mr. Davis never stated that he was opposed to the death penalty in any sense. Mr. Briley's sham assertion that Mr. Davis was opposed to the death penalty could only be based on a highly ambiguous exchange between defense counsel and Mr. Davis. Immediately after Mr. Davis said, "I would have to hear the case, the whole case, before ...," Ms. George asked:

> MS. GEORGE: Are you strongly in favor, somewhat in favor, or somewhat opposed or strongly opposed to the death penalty?
>
> MR. DAVIS: Somewhat.
>
> MS. GEORGE: Somewhat. Okay, I think that's too complicated. What would be—all right, at that point—let me back up and start again ...
>
> MS. GEORGE: Mr. Davis, did I ever get—you said you were somewhat.
>
> MR. DAVIS: Well, like I said until proven. When I said to hear the case, that's what I mean.

(T. 387-88) (emphasis added). It is clear that Mr. Davis merely indicated that he needed to hear the entire case before imposing a death sentence. *Id.*

121. As with juror Butler, the prosecutor never followed-up with voir dire questioning on this subject of alleged concern. Mr. Briley's failure to follow-up provides evidence that the explanation is a sham and a pretext for discrimination. *United States v. Brown*, 817 F.2d at 676.

122. Moreover, the prosecutor's pretextual reason for excusing Mr. Davis could have applied with equal force to white jurors who he declined to strike. Ms. Stapp stated that individual circumstances should be taken into account when considering sentencing (T. 103); Ms. Batchelor indicated that she could only impose the death penalty depending on the circumstances (T. 104); Mr. Carter indicated that he would have to hear the case before he could make a decision (T. 251); Mr. Ervin indicated that he would have to listen to the evidence before he could say what his opinion would be (T. 309); Ms. Shatterly indicated that she was only somewhat in favor of the death penalty (T. 314); and Mr. Hutcheson stated the proper sentence would depend on the circumstances or what caused the killings. (T. 390). The prosecutor's failure to explain this disparate treatment is additional evidence of pretext and racial discrimination. *See Ford*, 67 F.3d 162 at 168-69 (granting relief under *Batson* after comparing the answers of a stricken juror to those of seated jurors regarding the death penalty). *See also Burton*, 30 F.3d at 112; *Bennett*, 928 F.2d at 1551.

D. Mr. Ricky Thomas

123. The prosecutor allegedly excused Mr. Thomas because his father had been convicted of killing his mother and because Mr. Thomas had lived with his father after his father's release from prison. The prosecutor speculated that Mr. Thomas might "possibly identify his father's case with this one." (T. 619). However, Mr. Thomas indicated that he was not opposed to capital

punishment (T. 39); *he was in favor of the death penalty* (T. 106); and *he did not even remember the circumstances of the incident because he was only a child at the time.* (T. 71).

124. Mr. Thomas's responses and the State's failure to strike a white juror, Mr. Hensler, who had himself been convicted of voluntary manslaughter and who was much less adamant on the death penalty, expose the pretextual nature of the State's justifications for excluding Mr. Thomas. *Burton*, 30 F.3d at 112; *Bennett*, 928 F.2d at 1551. Furthermore, Mr. Briley never questioned Mr. Thomas about his relationship with his father or its alleged impact on his ability to decide the case fairly. This lack of questioning is further evidence of pretext. *United States v. Brown*, 817 F.2d at 676.

E. Ms. Mattie Pearl Harris

125. On voir dire, Ms. Harris stated that she could hold the state to its burden of proof, (T. 157), she could keep an open mind as to sentence, (T. 160), and she could keep an open mind if alcohol and drugs were involved. (T. 205). Ms. Harris also said that she was *somewhat in favor of the death penalty*, (T. 214), although she would not "automatically" vote for death. (T. 221).

126. The prosecutor struck Ms. Harris and offered this explanation: she expressed uncertainty about the death penalty; her son has to be locked up frequently and she does not want him punished; her daughter has been convicted and imprisoned and Ms. Harris is caring for her children; and she said the fact that the defendant killed three people means he is sick and needs help. (T. 621). These explanations were pre-textual for a number of reasons.

127. First, Mr. Briley failed to question Ms. Harris about the alleged legal problems of her children or the effect that those problems might have had on her ability to serve as a juror. Once again, the failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination. *United States v. Brown*, 817 F.2d at 676. Second, white jurors with similar views on the death penalty were not strucic.[44] *Burton*, 30 F.3d at 112; *Bennett*, 928 F.2d at 1551. Third, the record provides no support whatsoever for Mr. Briley's allegations concerning Ms. Harris' son or her daughter. Consequently, this allegation, and its acceptance by the trial court, is not due any deferential treatment by this Court. *See Ford v. Norris*, 67 F.3d at 168.

F. Mr. Lucious Boswell

128. The prosecutor stated that he excused Mr. Boswell because (1) he allegedly was the brother-in-law of Walter Davis, who allegedly had been prosecuted and convicted for trafficking cocaine; and (2) he had said that a person guilty of murdering three individuals should "be allowed to work it out in prison." (T. 620).[45]

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44 The prosecutor did not strike white jurors who were noncommittal on the death penalty. Furthermore, as already noted, Michael Tony Hensler, who was convicted of voluntary manslaughter by Mr. Briley's office, and who was less adamant on the death penalty, was not struck by the State. (T. 70).

45 Mr. Boswell testified that he was not conscientiously opposed to the death penalty, (T. 39) and that even if he had found Mr. Hightower guilty of three murders, he could keep an open mind as to the proper sentence. (T. 44).

129. Citing alleged past convictions of distant relations of black citizens is a peculiarly shameful and disingenuous pretext for striking black jurors, especially when a white citizen, Mr. Hensler, who had been convicted of voluntary manslaughter by the prosecutor's own office, is allowed to serve on the jury. (T. 70). The failure to explain the disparate treatment of black and white jurors is evidence that the explanation he gave for striking Mr. Boswell was pretextual. *See supra.*

130. Furthermore, the prosecutor failed to question Mr. Boswell about his alleged relationship with Mr. Davis. Not only did Mr. Briley not ask Mr. Boswell any questions about whether his relationship with Mr. Davis would affect his ability to serve as a juror on Mr. Hightower's case, his voir dire questioning of Mr. Boswell gives no indication that he and Mr. Davis were acquainted in any way. Thus, the assertion is not supported by any evidence on the record and is not due any deferential treatment by this Court. *See Ford v. Norris*, 67 F.3d at 168. Additionally, Mr. Briley's failure to engage in meaningful voir dire on this issue is further evidence that his real reason for excluding Mr. Boswell was to keep a black man off the jury. *United States v. Brown*, 817 F.2d at 676.

131. The trial court failed to make any independent inquiry concerning the State's alleged rationales for striking the black potential jurors.[46] Instead, the court immediately

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[46] To the extent defense counsel failed to present known rebuttal evidence, such as the fact that seated juror Mr. Hensler had been convicted of voluntary manslaughter while black potential jurors were struck merely for being *related* to individuals convicted of other offenses, they provided ineffective assistance. In many cases, however, the stated rationales were merely allegations not supported by the record, making the presentation of rebuttal evidence impossible.

accepted each proffered rationale. (T. 619-25). *See Garrett v. Morris*, 815 F.2d at 514 ("[the] trial court's immediate acceptance of [the] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."). Thus, the trial court failed to make a proper inquiry under *Batson* which would mandate deference by this Court to its "findings" that the State had properly put forth race-neutral reasons for its strikes. *In United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir.), *cert. dismissed*, 487 U.S. 1265 (1988), the Eleventh Circuit remanded a federal case for further factfinding under Batson when the federal trial court had failed to make any independent inquiry regarding proffered rationales for striking jurors. According to the *Gordon* court, the trial court's simple act of denying defense counsel's *Batson* motion could not satisfy the required inquiry. *Id.* at 1541. *Cf. United States v. Stewart*, 65 F.3d at 926 (trial court's finding regarding a Batson violation reversible only for clear error given the "thorough examination" conducted by the court).

132. The State's discriminatory exclusion of black potential jurors was purposeful discrimination that denied Mr. Hightower his constitutional rights to be tried by a jury comprising a fair cross-section of the community and to equal protection of the laws, guaranteed by the Sixth, Eighth, and Fourteenth Amendments. The evidence reveals the District Attorney's unsupported assertions of antagonism. His use of alleged family criminal histories to justify strikes was not race-neutral and specific, nor was it applied equally to both white and black venirepersons. *Accord Horton v. Zant*, 941 F.2d 14.49, 1460 n.29 (11th Cir. 1991) (finding evidence of race-based peremptory challenges in this very case). Because "the striking of [even] a single black juror for a racial reason violates the Equal Protection Clause,"

Gordon, 817 F.2d at 1541, Mr. Briley violated petitioner's constitutional rights on at least six separate occasions. Even if this Court decides to grant deference to the "findings" of the trial court regarding the proffered rationales for striking the black potential jurors, those findings are still clearly erroneous.

133. Mr. Hightower's appointed counsel raised the issue of the prosecution's racially discriminatory use of peremptory strikes on direct appeal. The Georgia Supreme Court noted Judge Prior's ruling that Prosecutor Briley articulated "legitimate non-racial reasons" for the peremptory strikes,[47] and held that "[e]ven assuming the defendant made out a prima facie case, the trial court's determination is not clearly erroneous." *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989) (citation omitted), *cert. denied*, 498 U.S. 882 (1990). The rulings of the Georgia state courts in this case contravened clearly established federal law as enunciated by the United States Supreme Court in Batson.[48]

134. Because the state court did not provide Petitioner with a full and fair opportunity to litigate the merits of this claim, Petitioner requests that this Court conduct a hearing at which evidence in support of the contentions made herein may be offered.

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47 *Contra Horton v. Zant*, 941 F.2d at 1460 n.29.

48 On Mr. Hightower's state habeas petition, the state habeas court found this contention procedurally barred by a Georgia rule forbidding state habeas relitigation of claims decided adversely to petitioner on direct appeal. Such a state rule does not bar habeas review by this court, however. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991); *Bennett v. Whitley*, 41 F.3d 1581, 1582 (5th Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER,	*	CIVIL ACTION NO. 3:96-CV-97 (DF)
Petitioner,	*	
v.	*	HABEAS CORPUS
TONY TURPIN, WARDEN,	*	28 U.S.C. § 2254
Respondent.	*	

ANSWER-RESPONSE

Comes now Tony L. Turpin, Warden, Georgia Diagnostic and Classification Prison, Respondent in the above-styled application for federal habeas corpus relief filed by a person imprisoned under a sentence of death, and files this his answer-response to this application, by showing and stating the following:

REQUIRED TRANSCRIPTS

1.

By means of a separate notice of filing, Respondent has complied with Rule 5 of the Rules Governing Section 2254 Proceedings and has filed 50 exhibits for this Court's use in considering this application for federal habeas corpus relief. Should this Court or counsel for Petitioner direct counsel for Respondent to any missing portions of the record in the state courts which should be presented to this Court for review,

Respondent will submit these additional documents upon request. Counsel for Respondent notes that there was

exhaustion to exist in this case based on the fact that any of these unexhausted claims would now be found to be procedurally defaulted by the Georgia courts pursuant to O.C.G.A. § 9-14-51, if these claims and/or subclaims were raised by Petitioner in a second state habeas corpus petition. Respondent's position that any such "new" claims or sub-claims should be treated as procedurally defaulted will be set forth more fully in the brief to be filed in support of this Answer-Response.

SPECIFIC ALLEGATIONS OF AMENDED PETITION

8.

Respondent denies that any of Petitioner's constitutional rights have been violated as asserted in Petitioner's application for federal habeas corpus relief. Respondent denies all material averments of the application. A more detailed factual and legal statement of Respondent's position will be set forth more fully in the briefs to be filed in support of the answer-response by Respondent.

9.

In response to the specific allegations of the application, Respondent asserts the following:

(a) Respondent denies the allegations contained in Claim I., paragraphs 53-92, inclusive, (p. 19-35 of petition) in which Petitioner contends that Petitioner was refused access to a qualified psychiatrist, thereby allegedly denying Petitioner the ability to prepare and present a defense or to present mitigating psychiatric evidence during the penalty phase of trial. It appears that this issue has been exhausted as

it was partially presented on appeal as enumeration of error no. 2, and was presented as Ground XI. of Petitioner's amended state habeas corpus petition.

(b) Respondent denies the allegations contained in Claim II. of the petition, paragraphs 93-101, inclusive, (pages 35-40 of the petition), in which Petitioner contends that the trial court's failure to strike for cause several jurors who allegedly had strongly stated views in favor of the death penalty so as to allegedly substantially impair their ability to consider a lesser sentence, thereby violating Petitioner's rights under the Sixth and Fourteenth Amendments to an impartial jury. Respondent further submits that Petitioner admits in paragraph 100 under this Claim that this claim was not raised at trial and on direct appeal and was thereby procedurally defaulted in the state court. Respondent submits that this Court should defer to the finding of procedural default made by the state court as to this claim, unless and until Petitioner can establish cause and prejudice to overcome this procedural default.

(c) Respondent denies the allegations contained in Claim III. of this petition, paragraphs 102-135, inclusive (pages 40-56 of the petition) in which Petitioner alleges that prosecutor Briley allegedly used peremptory challenges in a racially discriminatory manner, in violation of Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. It appears that this issue has been exhausted by virtue of its presentation as enumeration of error no. 22 on direct appeal and as Ground XV. of Petitioner's amended state habeas corpus petition.

(d) Respondent denies the allegations contained in Claim IV of the petition, paragraphs 136-137, inclusive (pages 56-78 of the petition), in which Petitioner contends

that there was alleged misconduct by Prosecutor Briley which deprived Petitioner of a fair trial and a reliable sentencing proceeding in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Despite the assertions of Petitioner to the contrary in paragraph 179 of the petition, Respondent submits that this claim was properly found to have been procedurally defaulted by the state habeas corpus court and thus, unless Petitioner can establish cause and prejudice, this claim, to the extent it was raised in the state habeas corpus proceeding, is procedurally defaulted.

The state habeas corpus court specifically found that as to any claims of prosecutorial misconduct based on the prosecutor's arguments at both phases of Petitioner's trial, that these claims had been procedurally defaulted. However, Respondent submits that this claim of prosecutorial misconduct as pled in the instant petition is considerably broader than the claim as it was pled in the state habeas corpus proceeding.

(1) Claim IV., A, alleges that prosecutor Briley instigated improper pre-trial behavior in an effort to prejudice Petitioner before the actual trial began. The bases of these claims may have been raised in the state courts as separate claims, but were not a part of Petitioner's claim of prosecutorial misconduct. Thus, if Claim IV., A., is deemed to be a separate claim from Claims I.-III. before this Court (see paragraph 138 of Petitioner's petition before this Court), it is unexhausted. If this Court deems Claim IV., A. to be a separate claim of prosecutorial misconduct not presented in the state courts, Respondent submits that this Court should treat this claim as procedurally defaulted because the Georgia Courts would treat them as procedurally defaulted under

O.C.G.A. Section 9-14-51, if presented in a second state habeas corpus petition.

(2) In Claim IV., B. 1., paragraphs 139-144 of the petition, Petitioner asserts that prosecutor Briley repeatedly resorted to improper arguments and statements throughout trial, by improperly interjecting his personal opinions.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER, Petitioner, v. TONY TURPIN, Warden Jackson State Prison, Respondent,	Civil Action File NO. 3:96-CV-97(DF) Chief Judge Duross Fitzpatrick POST-CONVICTION PROCEEDINGS CAPITAL CASE

PETITIONER'S MOTION PURSUANT TO RULE 59(E) OF THE FEDERAL RULES OF CIVIL PROCEDURE TO ALTER AND AMEND JUDGMENT, AND FOR A HEARING

Petitioner John Washington Hightower hereby files this motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and respectfully requests that this Court reconsider its decision and alter or amend the judgment entered on August 9, 1999, denying Mr. Hightower's petition for writ of habeas corpus (the "Order"). For the reasons stated below, Petitioner respectfully submits that the Court should vacate the judgment pending a hearing on the unresolved issues.

There are three primary reasons why this Court should grant this motion:

(1) By Order entered July 2, 1998, this Court ruled that three of Mr. Hightower's claims had been "properly hearing is not constitutionally required is, at the very least, an unreasonable application of clearly established federal law. All of these courts found absolute clarity in the dictates of the United States Supreme Court, as should this Court. Petitioner respectfully requests this Court to grant this motion and alter its previous Order by finding that the Georgia courts acted contrary to, or unreasonably applied, federal law.

III. NEITHER THIS COURT, NOR THE STATE COURTS, HAVE CONSIDERED FACTORS REQUIRED TO BE TAKEN INTO ACCOUNT IN EVALUATING PETITIONER'S BATSON CLAIM

Claim III of Mr. Hightower's Petition stated a claim that Prosecutor Briley had, as was notoriously his practice, exercised his peremptory challenges in Mr. Hightower's case in a racially discriminatory fashion. It would have been mathematically impossible for Mr. Briley to have empaneled a whiter jury, no matter how he exercised his peremptory strikes, given the characteristics and order of the venire. (Affidavit of Dr. Gary Liberson, Pet. Ex. B). Petitioner respectfully suggests that, in disposing of this Claim, this Court applied an incorrect analysis that did not consider factors the law requires be taken into account.

Batson v. Kentucky, 476 U.S. 79 (1986), established the relevant test for determining whether the State's exercise of peremptory strikes violates a defendant's due process rights, stating that

> [t]o establish such a case, the defendant first must show that he is a member of a

> cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.1 . . . Finally, the defendant must show that **these facts and any other relevant circumstances** raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (citation omitted; emphasis added).

In denying Claim DI of Mr. Hightower's Petition, this Court ruled that, although Mr. Hightower had "easily satisfied the first two prongs of his prima facie burden under Batson," the case foundered on the third. (Order at 24). Mr. Hightower respectfully suggests, however, that this Court did not properly apply the third prong of the Batson test, because neither this Court, nor any of the state courts that have considered this claim, have undertaken the comparative analysis required under the third prong: the comparison of black jurors who were struck with non-black jurors who were not. This Court's Order did not address the substantial evidence introduced by Mr. Hightower that compels rejection of the State's proffered justifications for Prosecutor Briley's discriminatory jury strikes.

Batson, by its terms, requires evaluation of the prosecution's pattern of strikes "and any other relevant circumstances" that may raise an inference of discrimination. *Batson*, 476 U.S. at 96. The most important circumstances

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1 *But see Powers v. Ohio*, 499 U.S. 400, 402 (1991) (race-based peremptory strikes impermissible "whether or not the defendant and the excluded jurors share the same races").

are the characteristics of the black jurors who were struck and the white jurors who were not, for if the prosecution enunciates a rationale to strike a black juror that would be equally applicable to a white juror who the prosecution did not strike, an inference would arise that the stated reason is mere pretext for discrimination.

Several courts have emphasized the requirement that a court compare the characteristics of stricken and non-stricken prospective jurors when assessing the third prong of a Batson claim. In *Mahaffey v. Page,* 162 F.3d 481 (7th Cir. 1998), the court of appeals evaluated a habeas petitioner's *Batson* claim where the prosecution had exercised seven of thirteen peremptory strikes against black prospective jurors. The trial judge, in rejecting the petitioner's claim, had "essentially found that because the excused African-Americans and the excused whites had similar characteristics, an inference of discrimination should not be drawn from the decision to strike the African-Americans." *Id.* at 485. This, however, was the incorrect analysis, as the court of appeals explained:

> [Rather than comparing the excused African-Americans to the excused whites, the trial judge should have been comparing the excused African-Americans to the jurors who remained, **for only through such a comparison could the judge assess whether race played any role in the State's challenges.** If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, **then an obvious inference, at least prior to the articulation of a race-neutral reason for the strike, would be that the**

> **strike was racially motivated.** As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the juror who was retained.

Id. at 485-86 (emphasis added).

Coulter v. Gilmore, 155 F.3d 912 (7th Cir. 1998), also stressed that "the crucial and determinative inquiry in a Batson claim is whether the state has treated similarly situated venirepersons differently based on race." *Id.* at 921. The prosecution in that case had exercised nine of ten peremptory strikes against black prospective jurors. *Id.* at 914. As in Mahaffey, in Coulter the trial court's evaluation of the petitioner's Batson claim had gone awry on the "relevant circumstances" prong. Although the court of appeals acknowledged that the state trial court had found that the prosecution had not purposefully discriminated, it observed that

> the state judge made those findings without ever taking into account the totality of circumstances on the record; instead, he looked only in an isolated way at individual jurors and individual reasons, **and even in that setting he overlooked remarkable similarities between the excluded African-Americans and the non-excluded Caucasians.**

Coulter, 155 F.3d at 920 (emphasis added). A failure to consider and compare the characteristics of stricken and non-stricken jurors, the court of appeals explained, would prevent the trial court from discerning the insidious discrimination Batson aimed to purge from the jury selection process,

because even "[a] facially neutral reason for striking a juror may show discrimination **if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic."** *Id.* at 921 (emphasis added). The trial court's failure to consider the relevant circumstances of the state's overall pattern of peremptory strikes, the court continued, had caused it to ignore evidence tending to invite an inference of discrimination:

> In the present case, even though the State struck Pinkins [a black person] because her mother worked at Mercy Hospital, it did not challenge Larry Saverslak (Caucasian), whose wife was a registered nurse. Likewise, at the same time the State claimed it was striking Adams because she was an LPN who might know too much about mental illness (even though, so far as the record reveals, she was not involved in the mental health field), it did nothing to remove Bertha Fangman (Caucasian) from the panel, even though her father had been treated for severe depression.

Id. This comparative analysis was, the court observed with unmistakable clarity, constitutionally mandated, and had to be performed at some point during the evaluation of any *Batson claim*:

> The Batson decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion[.]
>
> Regrettably, the juror-by-juror inquiry that the trial judge conducted, unsupplemented by any

> final look to the record as a whole despite counsel's efforts to present this evidence to the court, practically guaranteed the conclusion that the prosecution was acting race neutrally. . . . Batson requires more: **somehow, at some point, the trial court must evaluate the broader pattern of strikes, so that it can detect situations like those presented by Pinkins and Adams, where prospective jurors arguably are being treated dissimilarly from their non-minority counterparts.**

Id. at 921 (emphasis added).

To like effect is *Turner v. Marshall,* 121 F.3d 1248 (9th Cir. 1997), in which the prosecution used five of its nine peremptory strikes against black prospective jurors. *Id.* at 1250. The court of appeals, undertaking the analysis required by *Batson,* ruled that "a comparative analysis of a challenged and an unchallenged juror indicates racial discrimination in the jury selection process." *Id.* The court's opinion is especially useful in that it collects authorities from many jurisdictions for the bedrock *Batson* principle that [p]eremptory challenges 'cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.'" *Id.* at 1252 (quoting *Doss v. Frontenac,* 14 F.3d 1313, 1316-17 (8th Cir. 1994), and collecting authorities).[2]

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[2] The rule has been long recognized in this Circuit as well. *See, e.g., United States v. Stewart,* 65 F.3d 918, 926 (11th Cir. 1995), *cert. denied,* 516 U.S. 1134 (1996); *Hollingsworth v. Burton,* 30 F.3d 109, 112 (11th Cir. 1994) ("our analysis will focus on the similarities and

The *Turner* court focused on the differential treatment the prosecution applied to a black prospective juror who expressed mild apprehension about viewing graphic crime scene photographs, and a white prospective juror who described herself as "very squeamish about that type of thing" and stated that she would "have a problem looking at gory pictures." *Id.* The prosecution struck the black prospective juror but not the white one, giving only the reason that the black prospective juror had expressed hesitancy about viewing the photographs. This "vague musing," the court ruled,

> simply does not suffice to explain a peremptory challenge questioned under Batson. We are of the firm conviction that no legitimate justification for the challenge was advanced. Because the reluctance to view photographic evidence was the only reason actually proffered for [black prospective juror] McCain's exclusion, and because the voir dire transcript does not support a contrary inference, **we find the failure to challenge the similarly situated white juror to be fatal to the prosecutor's explanation.**

Id. at 1253-54 (emphasis added).

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differences between stricken black potential jurors and seated white jurors"), *cert. denied*, 513 U.S. 1131 (1995); *United States v. Bennett*, 928 F.2d 1548, 1551 (11th Cir. 1991) ("the district court may 'consider whether the reasons offered by the government for excluding a black member of the venire also applied to white members.' ") (citation omitted); *United States v. Horsley*, 864 F.2d 1543, 1541-46 (11th Cir. 1989).

All these authorities make clear that the comparative assessment of stricken and non-stricken jurors' characteristics is an integral, and indispensable, component of the "relevant circumstances" prong of the analysis mandated under *Batson*. Until that comparative assessment occurs, there has been no Batson analysis.

Petitioner respectfully submits that this Court's Order is based on misplaced deference to state court decisions which reflect that no proper comparative analysis ever took place. This Court's Order refers to the state courts' superior opportunity to observe and evaluate the demeanor of Prosecutor Briley. First, this deference is misplaced because the trial court did not even purport to make the required comparison between black jurors struck and white jurors empaneled. Second, the deference is misplaced because the voluminous record shows unmistakably that Prosecutor Briley's proffered justifications were transparently false, and that he struck black prospective jurors for reasons that were equally applicable to white jurors who were not struck. Thus, neither the state court, nor this Court, has ever undertaken the comparative analysis of stricken and non-stricken jurors required under the third prong of Batson.

Application of the proper analysis unmasks Prosecutor Briley's rationalizations as sheer pretext. The undisputed evidence recounted in Mr. Hightower's Petition shows that Prosecutor Briley repeatedly, and unconstitutionally, struck black jurors for reasons that were equally, or more, applicable to white jurors he did not strike.

- Prosecutor Briley struck black juror Thelma Butler on the grounds that he had prosecuted her brother-in-law some twelve years before

Mr. Hightower's trial. (Pet. ¶ 111).3 White prospective juror Michael Anthony Hensler, however, had himself been prosecuted for manslaughter by Prosecutor Briley's office, and convicted. (Pet. ¶ 113). Prosecutor Briley did not strike Mr. Hensler.

- Prosecutor Briley struck black juror Emerson Davis on the grounds that he was "somewhat opposed to the death penalty." (Pet. 119). This assertion is simple fiction, for Mr. Davis's-statements cannot be so characterized. (Pet. ¶ 120). Moreover, Prosecutor Briley did not strike white prospective jurors who expressed far stronger reservations about capital punishment than Mr. Davis. (Pet. ¶ 122).

- Prosecutor Briley struck black juror Ricky Thomas on the grounds that Mr. Thomas's father had been convicted of killing his mother. (Pet. ¶ 123). This rationale was at least equally, and probably more, applicable to white juror Michael Anthony Hensler, who himself had been prosecuted and convicted of voluntary manslaughter by Mr. Briley's office. But Mr. Briley did not strike white juror Hensler. (Pet. ¶ 124).

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3 It should be noted that absolutely nothing in the record supports Prosecutor Briley's assertion that he prosecuted Gerald Veasley *as* he claimed, or that Mr. Veasley was Ms. Butler's brother-in-law. *See Ford v. Norris*, 67 F.3d 162, 169 (8th Cir. 1995) (deference to state court's evaluation inappropriate where "the record simply offers no support whatsoever for the prosecutor's stated reasons for striking" the jurors).

- Prosecutor Briley struck black juror Mattie Pearl Harris in part because of her uncertainty about capital punishment, while not striking white jurors who expressed even greater, and less equivocal, discomfort with the death penalty. (Pet. ¶¶ 126-127).

- Prosecutor Briley struck black juror Lucious Boswell because his brother-in-law allegedly had been prosecuted and convicted of a narcotics offense. (Pet. ¶ 128). He did not strike white juror Hensler, however, who had himself been prosecuted and convicted of voluntary manslaughter. (Pet. ¶ 129).

Prosecutor Briley's actions had the actual effect of minimizing the number of black jurors to the minimum level statistically feasible given the composition and order of the venire, to such an extent that a statistical analysis yielded a probability far less than 1% that he was acting without regard to the race of the defendant or the jurors. (Affidavit of Dr. Gary Liberson, Pet. Ex. B).

Prosecutor Briley's well-documented history as a serial racial discriminator is also illuminating for the context it provides, making clear that his actions in Mr. Hightower's trial were not a sporadic lapse in judgment, but only a single episode in a clear pattern of misconduct spanning his entire career. Prosecutor Briley authored the infamous memorandum described in *Amadeo v. Zant,* 486 U.S. 214,217-18 (1988), which provided a veritable road map for official discrimination against black persons and others. (Pet.¶ 110). Even more tellingly, the Court of Appeals in *Horton v. Zant,* 941 F.2d 1449 (11th Cir. 1991), recounted Prosecutor Briley's history of race-based peremptory strikes

in unassailable depth, collecting and analyzing strike data from dozens of capital cases Prosecutor Briley had tried (including this case). The Court of Appeals found only two possibilities, the latter of which it dismissed as too far-fetched to take seriously:

> [E]ither Mr. Briley made his peremptory strikes based on the race of the venire members or Mr. Briley made his peremptory strikes based on some set of legitimate factors and these legitimate factors by sheer coincidence had virtually a one-to-one correlation with the race of the venire members. . . . [But] courts cannot make the leap of faith that there exists some set of legitimate factors which correlates one-to-one with the race of the venire members.

Horton, 941 F.2d at 1458. The Court of Appeals stated from the voluminous evidence that **"we cannot help but conclude that race was a very significant factor in Mr. Briley's decisionmaking process."** *Id.* at 1459 (emphasis added).

This Court's Order does not appear to take account of these factors, which constitute the "relevant circumstances" the courts are required to consider under *Batson*. It is no answer to refer to the state court's superior opportunity to evaluate the demeanor of those who appear before it. First, the issue here presented is not one of credibility that might pivot on nuanced subtleties of tone and body language—it is the clear and express factual impossibility that Prosecutor Briley's strikes actually rested on the reasons he gave, combined with an inescapable statistical history of gross abuse on his part. Second, the state court itself did not perform the comparative analysis *Batson* requires, evaluating

the prosecution's stated reasons for its strikes by comparing them with the characteristics of white jurors the prosecution did not strike. By merely accepting Prosecutor Briley's unsupported allegations at face value, the state court abjured, rather than discharged, its duty under *Batson.* This Court should not compound and extend that constitutional error by also failing to take account of the comparative factors *Batson* requires to be considered.

Accordingly, for the foregoing reasons, Mr. Hightower respectfully requests this Court to reconsider and vacate so much of its order as denied Claim III of his Petition.

CONCLUSION

Petitioner respectfully requests that this Court reconsider its Order entered August 9, 1999, denying Petitioner's Petition for a Writ of Habeas Corpus.

Petitioner also respectfully requests a hearing on the instant Motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER,	:	**CIVIL ACTION**
Petitioner,	:	**NO. 3:96-CV-**
vs	:	**97(DF)**
	:	
TONY TURPIN, Warden	:	**ORDER**
	:	
Respondent,	:	

Petitioner, John Washington Hightower, has filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to alter and amend the court's order entered August 9, 1999, denying his petition for writ of habeas corpus.

I. PREVIOUS ORDERS

A. Order of June 2, 1998

In an order dated June 2, 1998, this court ruled that the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") applied to all petitioner's claims in the habeas petition except those that were denied on procedural grounds by the state habeas courts and never adjudicated on the merits. Under the AEDPA, 28 U.S.C. § 2254(d), a § 2254 petition cannot be granted with respect to any claim adjudicated on the merits in state court, unless the state proceedings (1) resulted in a decision that is contrary to, or involved an unreasonable application of, a clearly established federal law as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the

evidence. We ruled that with respect to petitioner's claims member of that racial group; and (3) the totality of the circumstances raises an inference that the prosecutor used a peremptory challenge to exclude the juror because of race. *Id.* at 97. We found that while defendant had satisfied the first two prongs in Batson, the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily struck certain jurors because of their race.

During the trial, the defense pointed out that the prosecutor had used only seven peremptory strikes, six of which were used against African Americans. The defense also argued that the prosecutor had been shown in the past to have purposefully excluded African Americans from juries. The trial court asked the prosecutor to explain his reasons for striking each of the jurors. After hearing his explanations, the trial court overruled the *Batson* objection, ruling that the defense had failed to establish a prima facie case of discrimination by the prosecutor and that the prosecutor had articulated a non race-related reason for striking each African American juror. On direct appeal, the Supreme Court of Georgia held that the trial court's findings was not clearly erroneous since four of the jurors were closely related to persons convicted of serious felonies, and the other two stated conscientious opposition to the death penalty. The state appellate court further noted that at least two African American prospective jurors were struck by the defendant after having been accepted by the prosecutor. *Hightower v. State*, 386 S.E.2d at 512.

Petitioner claims that this court did not properly apply the third prong of the *Batson* test by considering "any other relevant circumstances" that may raise an inference of discrimination. Batson, 476 U.S. at 96. He cites authority

from the Seventh and Ninth Circuits to the effect that when addressing the third prong of a Batson claim a court must compare the characteristics of stricken and non-stricken prospective jurors. Petitioner argues that this court should not have deferred to the state courts on this issue because the trial court did not purport to make the required comparison between black jurors struck and white jurors impaneled, and because the record shows that the prosecutor's proffered justifications were transparently false.

Petitioner's assertions amount to a disagreement with the conclusion of this court as to whether the third prong of Batson was satisfied. As we found in the final order, however, the trial court had the best opportunity to view the prosecutor's demeanor and determine his credibility. Having done so, the trial court found there was a race-neutral basis for all the prosecutor's peremptory challenges of black prospective jurors. The Georgia Supreme Court affirmed the trial court's evaluation, finding that it was not clearly erroneous. The issue before this court was whether the Supreme Court of Georgia unreasonably applied Supreme Court authority to the facts before it within the meaning of AEDPA, and as clarified by *Neeley v. Nagle*. This court found that it could not say that the Georgia Supreme Court's determination was unreasonable or contrary to *Batson* or to any other Supreme Court case within the meaning of the AEDPA. The court adheres to this finding, with the additional comment that the Georgia Supreme Court's finding that the trial court's evaluation was not clearly erroneous did not constitute an unreasonable determination of the facts in light of the evidence. *Neeley*.

III. CONCLUSION

For the reasons stated herein, including the clarifications set forth in Section II.A. herein, petitioner's

motion to alter and amend the judgment entered August 9, 1999, denying petitioner Hightower's petition for writ of habeas corpus, is hereby **DENIED**.

SO ORDERED, this 27 day of September, 2000.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK
UNITED STATES DISTRICT JUDGE

September 16, 2005

Thomas K. Kahn
Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303

Re: John Washington Hightower v.
Fredrick Head
Case No. 00-15807-P

Dear Mr. Kahn:

On July 27, 2005, this Court directed the parties in the above-styled action to file letter briefs "commenting upon the application of *Miller-El v. Dretke*, 545 U.S. ____ 2005 to the above case." This letter brief is in response to this Court's request.

In *Miller-El v. Dretke*, 125 S.Ct. 2317 (2004), the Supreme Court found that Miller-El was entitled to prevail on his *Batson* claim. In its decision, the Supreme Court concluded that under the specific facts of that case, Miller-El had established that the prosecution used peremptory challenges to exclude black jurors on the basis of race. *Id.* at 2339-2340. Specifically, the Court found the following facts to be significant: (1) that 10 of 11 of the qualified black venire panel were peremptorily struck; (2) that two of the qualified black venire panel members were "ostensibly acceptable to prosecutors seeking a death verdict"; (3) that "the prosecution's chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion"; (4) "The State's attempts to explain the prosecutor's questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis"; and (5) "the strikes

correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2339-2340 (2005).

The relevant facts concerning the voir dire proceedings in Petitioner's case, as found by this Court in its decision affirming the denial of federal habeas corpus relief as to Petitioner's *Batson* claim, are easily distinguishable from those presented to the United States Supreme Court in *Miller-El v. Dretke*. First, the record is clear that the prosecutor in Petitioner's case used only seven of his authorized ten peremptory strikes and he used six of those seven to strike black prospective jurors. *Hightower v. Schofield*, 365 F.3d 1008, 1031 (11th Cir. 2004).

In contrast to *Miller-El v. Dretke*, this Court found the following in Petitioner's case: that "the prosecutor gave specific, non-racial reasons for each of his strikes of African-Americans: some struck jurors were related to persons he had prosecuted or convicted, while others appeared to him to be uncomfortable with rendering a death sentence." *Hightower v. Schofield*, 365 F.3d at 1034. Unlike the facts presented in *Miller-El v. Dretke*, in Petitioner's case, this Court found there was no evidence of the offering of pretextual reasons by the prosecutor for using his peremptory strikes, and this Court found that the prosecutor's "explanations fall well within the boundaries set by *Batson* and its progeny." This Court distinguished Petitioner's case from cases where the prosecutor's reasons for striking a prospective African-American juror were that the prospective juror had long hair, a mustache and a beard or the prosecutor "'just got a feeling about him.'" *Hightower v. Schofield*, 365 F.3d at 1034, citing *Purkett v. Elem*, 514 U.S.

765, 769 (1995) and *United States v. Horsley*, 864 F.2d. 1543, 1546 (11th Cir. 1989).

This Court also properly reviewed the trial court's ruling that Petitioner had failed to establish purposeful discrimination under the third step of a *Batson* analysis. *Hightower v. Schofield*, 365 F.3d at 1034-1035. This Court noted that "the *Batson* Court itself acknowledged that a trial court's findings on the question of discrimination 'turn on evaluation of credibility,' and require 'great deference' on review." *Hightower v. Schofield*, 365 F.3d at 1034, citing *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986). Therefore, this Court accorded the trial court's findings the "great deference required by Batson itself." *Hightower v. Schofield*, 365 F.3d at 1034.

This Court properly concluded from a review of the totality of the record that the prosecutor had stated "nonracial reasons for his strikes" and that "Hightower never provided the court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors. The judge was therefore free to accept the prosecutor's stated reasons at face value." *Hightower v. Schofield*, 365 F. 3d at 1035.

By contrast, in *Miller-El v. Dretke*, the Court found that, "the prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion." The Court in *Miller-El v. Dretke*, also found that the strikes "occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race." *Id.* at 2339. There was no such criticism made by this Court of the jury selection process utilized in Petitioner's case. The selection process in Petitioner's case was thoroughly recounted and examined by this Court in its prior

review of Petitioner's Batson claim. Following this Court's extensive examination of the nature of the jury selection process in this case, this Court rejected any assertion that discrimination was shown in the jury selection process itself. *Hightower v. Schofield*, 365 F. 3d 1008, 1029-1032 ("We begin our analysis of this claim by describing the process by which the jury was selected." In reviewing the process, this Court also detailed the specific reasons given by the prosecutor for striking the potential jurors who were African-American. *Hightower v. Schofield*, 365 F. 3d 1008, 1032, n.47 (11th Cir. 2004).

This Court noted that at the time that defense counsel raised their *Batson* challenge at trial, one basis for their challenge, in addition to the prosecutor's alleged strike pattern, was a newspaper article about *State v. Amadeo* in which the prosecutor in Petitioner's case allegedly had purposefully limited the number of African-Americans serving on grand juries. Hightower v. Schofield, 365 F. 3d 1008, 1031 (11th Cir. 2004). This Court also noted that a month after Petitioner's trial, the Court decided *Amadeo v. Zant*, 486 U.S. 214 (1988), in which the prosecutor had allegedly authored a memorandum about limiting the number of African-Americans on grand juries and that in *Horton v. Zant*, 941 F. 2d 1449, 1455-56 (11th Cir. 1991), decided some three years after Petitioner's trial, prosecutor Briley admitted authoring this memorandum. *Hightower v. Schofield*, 365 F. 3d 1008, 1031 n.46 (11th Cir. 2004).

In considering the totality of the circumstances for the purpose of analyzing the prosecutor's proffered reasons for striking African-American prospective jurors, this Court not only considered the entirety of the voir dire proceedings, but also evaluated the prosecutor's reasons in light of the "controversy [which] existed over the prosecutor's alleged

role in a scheme to minimize the representation of minorities on local juries." *Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004). Nevertheless, this Court appropriately deferred to the state court findings, noting that the record showed that "the court considered both of sides of the question and found that the prosecutor had sufficiently rebutted Hightower's allegation of discrimination." *Id.*

In according deference to the state court findings and reviewing the totality of the circumstances, this Court emphasized, "We are mindful of the harshness with which we criticized Briley in Horton for his past discriminatory practices. We recognize that these practices are relevant to his discriminatory intent in the case at hand. *See Horton*, 941 F.2d at 1455. But our task is to determine, in consideration of 'all relevant circumstances,' *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723 (emphasis added), and given our constraints under 28 U.S.C. § 2254, whether the state court judgment in this case runs afoul of federal law. We cannot say that it does." *Hightower v. Schofield*, 365 F. 3d 1008, 1035 (11th Cir. 2004).

Thus, just as in *Miller-El v. Dretke*, this Court evaluated allegations of past discriminatory practices by the prosecutor in jury selection in reviewing the credibility of his proffered reasons for striking African-American jurors and concluded that even in light of allegations about the prosecutor's past practices, his proffered reasons for exercising his strikes were not pretextual.

Subsequent to the Supreme Court's decision in *Miller-El v. Dretke*, this Court, in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), found the following in rejecting a Batson claim:

> After a careful review of the record, we cannot conclude that the totality of the circumstances provides clear and convincing evidence that the state court's finding of the absence of purposeful discrimination was incorrect, nor can we conclude that the court's corresponding factual determination was objectively unreasonable in light of the record before the court. As noted in the preceding discussion, McNair offers virtually no evidence to indicate that the prosecutor's articulated legitimate reasons for the individual strikes were pretextual. McNair's challenges in that regard are mere speculation lacking any persuasive force.

McNair v. Campbell, 416 F.3d 1291 (11th Cir. 2005). See also, *McPherson v. Commonwealth*, 2005 Ky. LEXIS 237 (Ky. 2005), (finding that the totality of the evidence presented in that case distinguished it from the facts presented in *Miller-El v. Dretke* and that there were no circumstances which would indicate that the prosecutor offered pretextual reasons for his strikes of African-Americans.)

In reviewing a post-*Miller-El Batson* claim, this Court in *McNair* utilized the same analysis utilized by this Court in Petitioner's case (rendered pre-*Miller-El*). In *McNair*, this Court described the defendant's burden on appeal, and specifically relied the Supreme Court's decision in *Miller-El v. Dretke*, by finding as follows:

> Also, because this claim was decided on the merits by the Alabama courts, McNair is not entitled to habeas relief unless he can "demonstrate that [the] state court's finding of

> the absence of purposeful discrimination was incorrect by clear and convincing evidence . . . and that the corresponding factual determination was 'objectively unreasonable' in light of the record." *Miller-El v. Cockrell*, 537 U.S. 322, 348, 123 S. Ct. 1029, 1045, 154 L. Ed. 2d 931 (2003); see 28 U.S.C. § 2254(d)-(e); ***Miller-El v. Dretke*, 162 L. Ed. 2d 196, ____ U.S. ___, [*45] 125 S. Ct. 2317 (2005). This standard is demanding, but not insurmountable. Dretke, ___ U.S. at ___, 162 L. Ed. 2d at 214, 125 S. Ct. at ____.**

McNair v. Campbell, 416 F.3d 1291 (11th Cir. 2005)

Thus, this Court in McNair implicitly acknowledged that the Supreme Court in *Miller-El v. Dretke*, did not change the required steps in a *Batson* analysis, but *Miller-El* simply represents an application of *Batson* to the unique facts of that case, including the evidence showing the "shuffling" of the jury selection. This adherence in *Miller-El v. Dretke* to established *Batson* progeny is demonstrated by reference to this Court's decision in *McNair v. Campbell*, 416 F. 3d 1291 (11th Cir. 2005). In McNair, this Court referenced *Miller-El v. Dretke*, but found the circumstances of that case to be distinguishable from the facts presented in *Miller-El v. Dretke*. Other post-*Miller-El* cases have also applied the seminal *Batson* test, and simply distinguished the facts of those cases from the specific facts of Miller-El. *See e.g. Murphy v. Dretke*, 416 F.3d 427 (E.D. Tex. 2005) (finding no evidence of jury shuffling to lower the presence of black jurors, no evidence of a prosecutorial policy/historic use of preemptories against black venirepersons, and no pretextual reasons offered by the prosecutor, as was present in Miller-El.); *U.S. v. Claytor*, 2005 U.S. Dist. LEXIS 14908

(W.D. Va. 2005) (finding no evidence to raise an inference that race motivated the prosecution's decision to strike the two members of the jury pool who were also black and defendant did not prove a prima facie case of discrimination, so as to distinguish the case from Miller-El); and *State v. Allen*, 2005 La. LEXIS 2107(La. 2005) (finding that the State's striking of five of the eight minorities on the panel and allowance of the remaining three minorities onto the jury, did not demonstrate a discernable pattern of discriminatory intent or rise to the level of discriminatory intent found in *Miller-El.*)

In short, nothing in the holding of *Miller-El v. Dretke* compels a different result than that reached by this Court in reviewing Petitioner's Batson claim under pre-*Miller-El Batson* precedent. Even subsequent to the decision in *Miller-El v. Dretke*, a Batson analysis continues to involve a consideration of the totality of the specific circumstances of the case, a consideration of whether the trial court's observation of the prosecutor's credibility and demeanor is entitled to deference and a determination of whether pretextual reasons for striking African-American jurors were given by the prosecutor. *See Miller El v. Dretke*, 125 S.Ct. 2317, 2339-2340 and *Hightower v. Schofield*, 365 U.S. 1008, 1034-1035 (11th Cir. 2004), relying on *Batson*, 476 U.S. at 98 and *Miller-El v. Cockrell*, 537 U.S. 322, 338-339 (2003).

This Court's original analysis of Petitioner's *Batson* claim was in accordance with *Batson* precedent and the same analysis used by this Court was also applied by the Supreme Court, to a different set of facts, in *Miller-El v. Dretke*. Therefore, an application of the *Batson* analysis used by the Court in *Miller-El v. Dretke* does not alter this Court's original holding rejecting Petitioner's Batson claim, as the facts of Petitioner's case are clearly distinguishable from the

set of facts found to establish purposeful discrimination in *Miller-El v. Dretke*.

CONCLUSION

This Court should conclude that it utilized the appropriate *Batson* analysis in its initial rejection of Petitioner's Batson claim and should further find that the facts of Petitioner's case are distinguishable from those presented in *Miller-El v. Dretke*. Having correctly applied the Batson test to the facts of Petitioner's case which are distinguishable from those presented to the Supreme Court in *Miller-El v. Dretke*, this Court should reaffirm its original judgement denying Petitioner federal habeas corpus relief as to his *Batson* claim.

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I do hereby certify that I have this day served the within and foregoing *En Banc* Brief of Appellee, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

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A220

No. S89PO575

In the Supreme Court of the United States

JOHN HIGHTOWER,
Appellant,

v.

STATE OF GEORGIA
Appellee.

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O. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISCHARGE THE JURY

(ENUMERATION OF ERROR NO. 22).

Appellant alleges in his 22nd enumeration of error that the state improperly exercised peremptory strikes to systematically exclude blacks from the trial jury.

Appellee submits that this contention is without merit and that the trial court, after conducting a hearing in accordance with *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), properly held that there had been no systematic exclusion of blacks from the jury.

In making a motion pursuant to *Batson*, and in order to establish a prima facie case of purposeful discrimination, the Appellant simply stated that **six** of the seven prosecution peremptory strikes were used to strike blacks from the jury panel. (T. 615). Appellant then cited to the case of *State v. Amadeo*, concerning the grand jury in Putnam County, to demonstrate purposeful discrimination. (T. 615-617). In response to Appellant's allegations, and in lieu of a ruling by the trial court on whether the Appellant had established a prima facie case, the state offered proof of a neutral and specific explanation for each strike. (T. 617-625).

The trial court subsequently ruled that the jurors had been peremptorily challenged for valid reasons by the state. (T. 626).

Appellee submits that in the instant case the Appellant has failed to establish a prima facie case of purposeful discrimination in the selection of the trial jury, and that even if a weak prima facie case had been

established, the state adequately met its burden of proof with a neutral and specific explanation for each strike.

This Court has stated in several recent cases that even though "the state's use of its strikes when considered in isolation might raise the inference of racial intent," a solely numerical analysis without a showing of "other relevant circumstances" fails in and of itself to sufficiently establish a prima facie case of discrimination. *Aldridge v. State*, 258 Ga. 75, 365 8.E.2d 111 (1988); *Mincey v. State*, 257 Ga. 500, 360 S.E.2d 578 (1987).

Assuming, *arguendo*, that the Appellant had established a weak prima facie case of discrimination in the state's use of peremptory strikes, Appellee submits that the prosecution adequately met its burden of proof at trial when it volunteered a neutral, clear, and specific explanation for each challenge. (R. 619-625).

As noted, the trial court ruled that the state had given sufficient explanations for the use of peremptory strikes on non-racial grounds. "The trial court's findings are, of course, entitled to 'great deference'. . . and will be affirmed unless clearly erroneous." *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987). Appellant has failed to demonstrate a prima facie case of purposeful discrimination, and the state has offered a reasonable explanation for each strike. Therefore, the trial court properly denied Appellant's motion, and thus Appellant's 22nd enumeration of error is without merit.